Supreme Court, U.S.
FILED

160 (1) 091342 APR 28 2010

No. OFFICE OF THE CLERK

In The

# Supreme Court of the United States

JERI-ANN SHERRY,
*Petitioner,*

*v.*

WILLIAM D. JOHNSON
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

Michael A. Cox
Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
restucciae@michigan.gov
(517) 373-1124

Joel D. McGormley
Chief of Appellate Division

Attorneys for Petitioner

## QUESTION PRESENTED

In a State trial court, the counsel for William Johnson agreed to close the courtroom for the testimony of three witnesses who were afraid because two other witnesses had been murdered during the pendency of the case. The Michigan courts concluded that there was no ineffective assistance of counsel for agreeing to the closure of the courtroom. The U.S. Court of Appeals for the Sixth Circuit determined that counsel may have been ineffective and that any prejudice should be presumed if the State trial court would not have closed the courtroom but for the agreement of counsel. The question presented is as follows:

> Where there is a conflict of circuits on whether a criminal defendant must prove actual prejudice for ineffective assistance that relates to a structural error, did the Michigan courts unreasonably apply clearly established Supreme Court precedent under 28 U.S.C. § 2254(d) in rejecting the claim of ineffective assistance of counsel because it did not affect the outcome?

## PARTIES TO THE PROCEEDING

Petitioner is Jeri Ann Sherry, Warden of a Michigan Correctional Facility. Petitioner was respondent-appellee in the U.S. Court of Appeals for the Sixth Circuit. The petition will refer to Petitioner as the State of Michigan.

Respondent is William Johnson, an inmate in the Michigan Department of Corrections. Respondent was the petitioner-appellant in the Sixth Circuit.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

PARTIES TO THE PROCEEDING ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 3

1. The Crime ..... 3
2. The Closing of the Courtroom ..... 4
3. The State Courts on Direct Review ..... 7
4. The Federal Courts in Habeas Corpus Review ..... 9

REASONS FOR GRANTING THE PETITION ..... 12

1. There is no clearly established Supreme Court precedent that indicates a court should presume prejudice for a claim of ineffective assistance of counsel for a violation of the right to a public trial. ..... 13
2. The circuits have reached conflicting decisions on this same issue ..... 20

CONCLUSION ..... 23

APPENDIX

United States Sixth Circuit Court of Appeals Order dated January 28, 2010 ..... 1a-1a

United States Sixth Circuit Court of Appeals
Opinion dated November 13, 2009 ..... 2a-24a

United States District Court Opinion and Order
dated February 12, 2008 ..... 25a-66a

Michigan Court of Appeals Opinion
dated August 24, 2004 ..... 67a-91a

## TABLE OF AUTHORITIES

Page

**Cases**

*Arizona v. Fulminante*,
499 U.S. 279 (1991) ..... 17, 21

*Davis v. United States*,
411 U.S. 233 (1973) ..... 18, 22

*Francis v. Henderson*,
425 U.S. 536 (1976) ..... passim

*Gannett Co. v. DePasquale*,
443 U.S. 368 (1979) ..... 13

*In re Oliver*,
333 U.S. 257 (1948) ..... 13

*Johnson v. Sherry*,
586 F.3d 439 (6th Cir. 2009) ..... 19

*Owens v. United States*,
483 F.3d 48 (1st Cir. 2007) ..... 20, 21, 22

*Presley v. Georgia*,
558 U.S. ___; 130 S. Ct. 721 (2010) ..... 13, 19

*Press-Enterprise Co. v. Superior Court of California*,
464 U.S. 501 (1984) ..... 14

*Purvis v. Crosby*,
451 F.3d 734 (11th Cir. 2006) ..... 21, 22

*Strickland v. Washington*,
466 U.S. 668 (1984) ..... 15, 16, 21

*United States v. Canady*,
126 F.3d 352 (2d Cir. 1997) ..... 20

*United States v. Gonzalez-Lopez*,
548 U.S. 140 (2006) ..... 17

*Waller v. Georgia*,
467 U.S. 39 (1984) ..... passim

**Statutes**

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 2254(d) ..... i, 12

28 U.S.C. § 2254(e)(1) ..... 2

28 U.S.C. § 2255 ..... 22

## OPINIONS BELOW

The decision of the Sixth Circuit, *Johnson v. Sherry*, reversing the district court's denial of habeas corpus relief is reported at 586 F.3d 439 (6th Cir. 2009). Pet. App. 2a-24a. The order of the Sixth Circuit denying a motion for rehearing is unpublished. Pet. App. 1a. The district court decision is also unpublished. Pet. App. 25a-66a.

For the State court decisions, the decision of the Michigan Court of Appeals in *People v. Johnson* is unpublished. Pet. App. 67a-91a. The Michigan Supreme Court denied leave in an unpublished decision.

## JURISDICTION

On January 28, 2010, the Sixth Circuit entered an order denying the State of Michigan's motion for rehearing with a suggestion for rehearing en banc. The decision that the State asked the Sixth Circuit to rehear was entered on November 13, 2009. This Court has jurisdiction to review this writ of certiorari under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Sixth Circuit determined that the performance of Johnson's counsel may be deficient for agreeing to the closure of the courtroom for three of the eighteen witnesses who testified at trial. The Sixth Amendment provi 'es an accused the right to a public trial and the right "to have the assistance of counsel for his defense" in all criminal prosecutions.

Regarding the relevant statutory provisions, the prisoner challenged the basis of his confinement under

28 U.S.C. § 2254(e)(1) of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in habeas corpus, which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

With regard to factual determinations by the State court under 28 U.S.C. § 2254(e)(1), the federal courts must accord a presumption of correctness unless rebutted by clear and convincing evidence:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

## STATEMENT OF THE CASE

William Johnson was convicted in State court in Michigan following a jury trial in 2003 of second-degree murder and three counts of assault with intent to murder. During the course of the trial, the prosecution moved to close the courtroom because three of its witnesses were fearful of reprisals. During the pendency of the case, two eyewitnesses to the crime had been murdered. Before ruling on the motion to close the courtroom for these fearful witnesses, the counsel for Johnson acquiesced to the motion and later asked persons from Johnson's family to remain outside the courtroom for their testimony. The Sixth Circuit determined that this consent to close the courtroom may have been deficient performance – remanding to the district court on that issue – and that it would presume prejudice if the federal district court concludes on remand that the State trial court would not have closed the courtroom in the absence of consent.

### 1. The Crime

On March 3, 2002, Carlos Davis was shot and killed outside of a dance hall in Hamtramck, Michigan, a city enclosed within the City of Detroit. Pet. App. 67a. There were three other assault victims – Robert Richards, James Mathis, and Larry Lewis. Pet. App. 67a. Mathis was shot in the face, Trial, January 7, 2003, Vol. II, p. 13, and Lewis was shot in the stomach, Vol. II, p. 52. The shooting occurred after a brawl had broken out among persons who attended a party at the dance hall that night. Pet. App. 67a.

Only two witnesses reported to seeing the shooter. Richards told the police that he saw the shooter and gave the police a detailed description of his clothing. Pet. App. 68a. From photographs that the police obtained from his description, Richards then identified Johnson as the shooter. Pet. App. 68a. Richards identified Johnson at the preliminary examination, but was murdered after the preliminary examination and so his transcript was read at trial. Pet. App. 68a.

The other witness, Damon Ramsuer, signed a statement that he saw the shooter, identifying Johnson from the photographs taken from the party. Pet. App. 68a. Ramsuer failed to appear for Johnson's preliminary examination. At trial, Ramsuer denied seeing the shooter, denied informing the police that he saw the shooter, and denied making any identification. Pet. App. 68a. He was impeached with his signed statement at trial. Pet. App. 68a.

The jury convicted Johnson of second-degree murder and three counts of assault with intent to murder.

### 2. The Closing of the Courtroom

On the first day of trial, the prosecution moved to close the courtroom for the testimony of Mathis, Lewis, and Ramsuer. Pet. App. 68a. The prosecution explained that two other witnesses, Elvin Robinson, an eyewitness from the scene of the shooting, and Robert Richards had been murdered during the pendency of the case. The prosecution explained the justification:

> [Mr. Robinson] was murdered in his car outside of a bar prior to his testimony of the preliminary exam. So he's one witness who was murdered.
>
> We have a second witness [Robert Richards] who was murdered in his bed after he testified. So there are two witnesses who were killed under very suspicious circumstances. [Trial, January 6, 2003, Vol. I, pp. 135-136.]

The prosecution explained the exceptional nature of the request:

> [T]he level of paranoia from the witnesses is not unfounded. To have two witnesses murdered prior to testifying or after testifying is unprecedented in my experience.
>
> And the witnesses are literally terrified. One witness we transported out of state. We set up a residence out of state.
>
> There are witnesses who are cowering, refusing to come to court, even under threat of being arrested, because they are afraid for their lives.
>
> So I would ask as a precautionary measure, just for a couple of civilian witnesses[.] [Vol. I, p. 137.]

In response to the request, the State trial court had initially stated that the prosecution was "treading on some very dangerous ground" in seeking to close the courtroom for the three witnesses. Vol. I, p. 135. After the factual presentation by the prosecution, the counsel for Johnson noted that he had spoken to Johnson and did not oppose the closure as long as the jury was not tipped off to the fact:

> Judge, let me make this very simple. Mr. Johnson and I have discussed this issue since Mr. Moran [State trial prosecutor] brought it to my attention.
>
> If the Court wants to do that, we don't really have any objection to it for those certain witnesses. The only thing I'm concerned about is that we do it well away from the jury; that either we excuse, you know, so it doesn't look like it's some weird circumstance. I mean, I don't have any problem. [Vol. I, p. 138.]

The State trial court thereby agreed to this process by which it would ensure that the jury was not aware that the courtroom was closed for these three witnesses. Vol. I, pp. 138-139.

The testimony of these three witnesses occurred on the second day of trial of a three-day jury trial. The testimony of the first witness, James Mathis, began at 9:49 a.m., Vol. II, p. 6, and the testimony of the third witness, Damon Ramsuer, was completed at 11:31 a.m. on that same day, Vol. II, p. 115. Thus, the courtroom was closed for one hour and forty two minutes during

this three-day trial that continued into the morning of the fourth day.

The counsel for Johnson indicated that he had asked the people from Johnson's family to arrive around 11:00 a.m. on that day of trial and to sit outside until the testimony of the third witness was complete. Vol. II, p. 6.

### 3. The State Courts on Direct Review

On direct review, among his other issues, Johnson claimed that he was deprived of the right to a public trial under the Sixth Amendment and that he was deprived of his right to effective counsel by his attorney's decision to agree to closing the courtroom. The Michigan Court of Appeals rejected both claims.

Regarding the right to a public trial, the Michigan Court of Appeals noted that Johnson "expressly waived his right by assenting to the trial court's decision to close the courtroom during the three witnesses' testimony." Pet. App. 69a-70a.

Moreover, the Court of Appeals determined that the State trial court properly closed the courtroom, citing the four factors from this Court's decision in *Waller v. Georgia* regarding courtroom closure.[1] The State court rested its decision on the safety concerns for the two witnesses:

> Here, the record discloses that these four [*Waller*] requirements were satisfied. The

---

[1] *Waller v. Georgia*, 467 U.S. 39, 46 (1984).

> prosecutor showed that there was an overriding interest because three key witnesses, including two complainants, were justifiably afraid to testify because two other witnesses had been killed under suspicious circumstances. The closure was not broader than necessary to protect these witnesses' safety, and defendant did not propose an alternative means of protecting their safety. And, though the trial court did not specifically articulate findings in support of the closure, it is apparent from the record that the trial court's decision was based on the suspicious deaths of Richards and Robinson. . . . We are satisfied that the suspicious deaths of two other witnesses were sufficient to justify concerns for the witnesses' safety. [Pet. App. 71a (citations omitted).]

Regarding the issue of ineffective assistance of counsel, the Michigan Court of Appeals determined that there was no deficient performance because the courtroom closure was "justified" under the circumstances of the case. Pet. App. 79a. The Michigan Court of Appeals also determined that this decision to acquiesce to the closure was not "outcome determinative." Pet. App. 79a-80a. The Michigan Supreme Court denied leave to appeal on the issue.

### 4. The Federal Courts in Habeas Corpus Review

On habeas corpus, the federal district court denied Johnson's claims that he was deprived of his right to a public trial and the right to the effective assistance of counsel. The district court determined that Johnson "waived his right to a public trial by his acquiescence, through his attorney, to the closure." Pet. App. 41a. The district court also determined that the State appellate court's application of *Waller* was reasonable. Pet. App. 42a.

On the ineffective assistance claim, like the Michigan courts, the federal district court concluded that Johnson had failed to show that the failure to object fell outside the range of competent professional assistance under the first prong of *Strickland*. Pet. App. 54a.

On appeal, over a cogently written dissent, the Sixth Circuit reversed. The Sixth Circuit acknowledged that the substantive claim of a Sixth Amendment right to a public trial was procedurally defaulted, but examined whether there was a showing of cause and prejudice to excuse this default. Pet. App. 13a. The Sixth Circuit then examined this question together with Johnson's claim of ineffective assistance of counsel.

Contrary to the State courts and the federal district court, the Sixth Circuit majority concluded that it was "far from convinced" that this was one of the rare circumstances in which a courtroom closure was justified. Pet. App. 15a. Rather, it stated that it was

"difficult to see how the failure to object to the closure could have been strategic." Pet. App. 17a. It remanded for an evidentiary hearing on that issue. Pet. App. 20a. The Sixth Circuit never addressed the fact that the Michigan Court of Appeals had determined that the closure of the courtroom was justified under *Waller*, and also failed to address the federal district's conclusion that this determination was "reasonable."

On the issue whether there was any showing of prejudice, the Sixth Circuit determined that prejudice would be presumed as long as the State trial court would have closed the courtroom over an objection if Johnson's counsel had objected. Pet. App. 17a. If the State trial court would not otherwise have closed the courtroom, the Sixth Court stated that prejudice would then be presumed because the right to a public trial was a structural guarantee. Pet. App. 17a-18a.

In dissent, Sixth Circuit Judge Kethledge reasoned that there was no ineffective assistance of counsel demonstrated by the record because there was an apparent strategic basis for Johnson's counsel to agree to the closure:

> The question before us is whether that decision was so far outside the bounds of competent representation as to amount to constitutionally ineffective assistance of counsel. I do not think the decision can possibly be seen that way. Having reviewed the trial transcript, it seems to me instead that the decision was *correct*. Johnson's counsel essentially agreed to close the courtroom during the testimony

> of three witnesses, out of a total of 18 witnesses at trial. Strategically the net effect of that closure, as Johnson now describes it, was that several of his "female relatives" did not witness the testimony of those three witnesses. In return, Johnson's counsel deflected the trial judge from a line of inquiry—as to why, exactly, these three witnesses were so terrified to testify against Johnson—that almost certainly would have reflected poorly on his client.
>
> That avoidance appears all the wiser given that it emerged at Johnson's sentencing—and perhaps could have emerged sooner, had Johnson's counsel fought the closure—that Richards was shot to death with ammunition from the same lot that Johnson used to kill Davis and wound Lewis and Mathis. The Constitution, suffice it to say, permitted this strategic choice. [Pet. App. 22a-23a (emphasis in original; paragraph break added).]

Judge Kethledge further explained that there is a conflict in the circuits on whether a habeas petitioner must make a showing of prejudice when claiming that the attorney was ineffective related to the issue of one's right to a public trial. Pet. App. 24a.

## REASONS FOR GRANTING THE PETITION

There are two reasons why this Court should grant this writ of certiorari, both of which indicate that the decision of the Sixth Circuit was not based on clearly established Supreme Court precedent under 28 U.S.C. § 2254(d).

First, the Sixth Circuit determined that where the claim of ineffective assistance of counsel related to the right to a public trial – a claim that the ineffective assistance caused a structural error – that the prejudice prong of *Strickland* is presumed. The Sixth Circuit employed this same analysis to resolve Johnson's procedural default, allowing him to demonstrate cause and presume prejudice to avoid the default. This Court has not held that the prejudice prong of *Strickland* is in applicable where the alleged error relates to a defendant's right to a public trial. In fact, this Court has specifically held that a habeas petitioner must still prove actual prejudice to overcome a procedural default even if the claim of error related to a structural error. Thus, the decision of the Sixth Circuit conflicts with this Court's precedent.

Second, there is a circuit split on the issue whether a court should presume prejudice in these circumstances. The Eleventh Circuit determined that the actual-prejudice requirement from *Strickland* applies for a claim that the ineffective assistance of counsel allowed the criminal defendant's right to a public trial to be violated, while the First Circuit concluded – as here – that prejudice is presumed in that circumstance. This is a jurisprudentially significant issue and requires this Court's resolution to address the conflict.

### 1. There is no clearly established Supreme Court precedent that indicates a court should presume prejudice for a claim of ineffective assistance of counsel for a violation of the right to a public trial.

There are two controlling cases that frame this issue. This Court outlined the standard for evaluating whether a criminal defendant is deprived of a right to a public trial in *Waller v. Georgia*. The standard for evaluating an ineffective assistance counsel claim, however, requires proof of actual prejudice under *Strickland*. These decisions do not resolve the inquiry about whether a court should presume prejudice where a criminal defendant claims that his counsel wrongly consented to a closed courtroom.

In *Waller*, this Court noted that the right of a criminal defendant to public trial is based on the fact that on open proceeding will enable the public to see that the defendant is fairly dealt with and not unjustly condemned, and that the criminal defendant's triers will be kept attentive to their responsibility and to the importance of their functions.[2] The right to an open trial may give way to other rights or interests, such as the government's interest in inhibiting disclosure of sensitive information.[3] This Court described the circumstances in which this will occur as "rare" and

---

[2] *Waller*, 467 U.S. at 46, citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979). This Sixth Amendment right applies to the States through the Fourteenth Amendment. *In re Oliver*, 333 U.S. 257 (1948). *See also Presley v. Georgia*, 558 U.S. ___; 130 S. Ct. 721 (2010).

[3] *Waller*, 467 U.S. at 45.

indicated that the balancing of interests must "be struck with special care."[4]

In evaluating the particular case at issue in *Waller*, this Court identified four factors that a court should consider in determining whether the closure of the courtroom would be justified:

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced,
>
> [2] the closure must be no broader than necessary to protect that interest,
>
> [3] the trial court must consider reasonable alternatives to closing the proceeding, and
>
> [4] it must make findings adequate to support the closure.[5]

This Court noted that where there is a showing of a violation of this right, there would be no requirement of a showing a "specific prejudice."[6] Therefore, such an error is structural in nature.

In contrast, on the issue of the effective assistance of counsel, this Court has identified a two-

---

[4] *Waller*, 467 U.S. at 46, citing *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984).

[5] *Waller*, 467 U.S. at 48 (paragraph breaks inserted), citing *Press-Enterprise*.

[6] *Waller*, 467 U.S. at 49.

prong standard for showing that a criminal defendant has been deprived of the effective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, the defendant must show that the deficient performance *prejudiced* the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[7]

The second prong requires proof that the "result of the proceeding would have been different" but for the trial counsel's deficient performance.[8]

The Sixth Circuit majority concluded that where the courtroom closure was "unjustified or broader than necessary, prejudice would be presumed" under *Waller*. Pet. App. 17a-18a. But the majority did not address the point that this Court has not previously issued a decision on whether this presumption of prejudice should apply for a claim of ineffective assistance of counsel in these circumstances.

---

[7] *Strickland v. Washington*, 466 U.S. 668, 687 (1984)(paragraph break added; emphasis added).

[8] *Strickland*, 466 U.S. at 694.

On this point, Judge Kethledge in dissent noted that there is no clearly established Supreme Court precedent that provided for this result:

> But I simply do not see how, when Johnson presents a *Strickland* claim and *Strickland* by its terms imposes an *actual-prejudice* standard, we can hold that clearly established Supreme Court precedent required the Michigan state courts to apply a presumed-prejudice standard instead. [Pet. App. 24a (emphasis in original).]

And there was no showing of actual prejudice here.

This Court has identified exceptions to the "general requirement" that a criminal defendant prove prejudice for a claim of ineffective assistance of counsel, but has not identified the right to public trial as one of the claims of error that is an exception.[9] In *Strickland*, this Court described the circumstances under the Sixth Amendment where prejudice is presumed – where there is an actual or constructive denial of counsel, state interference with counsel's assistance, or the counsel has an actual conflict of interest.[10] *Strickland* did not list the right to a public trial.

A plurality of this Court in *Fulminante v. Arizona* noted that the list of structural error includes

---

[9] *Strickland*, 466 U.S. at 693.

[10] *Strickland*, 466 U.S. at 691-692.

the right to a public trial among others.[11] But this Court has not identified that ineffective assistance of counsel from a claim of error based on the right to a public trial as being among the list of exceptions to *Strickland* in requiring proof of actual prejudice.

In fact, in an analogous setting, this Court has required proof of a showing of actual prejudice to overcome a procedural bar arising from the failure to challenge a structural error at trial – exclusion of members of the defendant's race from the grand jury. In *Francis v. Henderson*, this Court examined in a habeas corpus proceeding the claim that a habeas petitioner argued that his conviction was obtained improperly because African Americans had been excluded from his grand jury.[12] This claim was procedurally defaulted in State court for his failure to

---

[11] *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (Rehnquist, CJ., plurality opinion)("Since our decision in *Chapman*, other cases have added to the category of constitutional errors which are not subject to harmless error the following: unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986); the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8 (1984); and the right to public trial, *Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984). Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."). *See also United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n. 4 (2006) ("Rather, here, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error. *See Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984) (violation of the public-trial guarantee is not subject to harmlessness review because 'the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance')").

[12] *Francis v. Henderson*, 425 U.S. 536, 538 (1976).

object to the process.[13] This Court concluded that the habeas petitioner must prove "actual prejudice" to avoid the application of the default:

> We conclude, therefore, that the Court of Appeals was correct in holding that the rule of *Davis v. United States* applies with equal force when a federal court is asked in a habeas corpus proceeding to overturn a state-court conviction because of an allegedly unconstitutional grand jury indictment. In a collateral attack upon a conviction that rule requires, contrary to the petitioner's assertion, not only a showing of "cause" for the defendant's failure to challenge the composition of the grand jury before trial, but also a showing of *actual prejudice*.[14]

In citing the decision in *Davis v. United States*, this Court specifically noted that "'[t]he presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner.'"[15] This decision has not been overruled.

The decision by the Sixth Circuit majority here conflicts with *Henderson*. The Sixth Circuit majority

---

[13] *Henderson*, 425 U.S. at 538.

[14] *Henderson*, 425 U.S. at 542 (emphasis added; footnote omitted).

[15] *Henderson*, 425 U.S. 542 n. 6, quoting *Davis v. United States*, 411 U.S. 233, 244-245 (1973).

indicated that the presumption of prejudice would allow Johnson to show prejudice to overcome his procedural default. See Pet. App. 18a.[16] Despite this Court's holding in *Henderson*, the Sixth Circuit majority concluded that prejudice would be presumed for both the default and ineffective assistance of counsel claim if the State trial court would not have ordered the courtroom closed. This conclusion cannot be reconciled with *Henderson*. The rule articulated by *Henderson* ensures that a criminal defendant will raise his claims in a timely fashion, and not harbor error as an appellate parachute.

The significance of the Sixth Circuit's decision here is heightened by this Court's recent decision in *Presley v. Georgia*.[17] This Court reiterated the point that this right under the Sixth Amendment to a public trial applies to the voir dire itself.[18] Therefore, under the Sixth Circuit's decision here, any cases in which the State courts may have closed the courtroom during voir dire to accommodate prospective jurors would be subject to a challenge under *Presley* without any requirement of *proving actual prejudice*. An allegation of deficient performance for failing to object to the

---

[16] *Johnson v. Sherry*, 586 F.3d 439, 447 n. 7 (6th Cir. 2009) ("As discussed in *Owens*, 483 F.3d at 64 n.13, Johnson must make two showings of prejudice. First, he must show that counsel's failure to object to the trial closure prejudiced him for purposes of determining whether there was ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. Second, he must show prejudice to excuse his procedural default on the public trial claim. *Coleman*, 501 U.S. at 750. As was true in *Owens*, "[w]e believe that these showings of prejudice overlap, and we [address] them simultaneously." 483 F.3d at 64 n.13[.]").

[17] *Presley v. Georgia*, 558 U.S. ___; 130 S. Ct. 721 (2010).

[18] *Presley*, 130 S. Ct. at 725.

closing of the courtroom may be alone sufficient to establish a claim of ineffective assistance of counsel.

**2. The circuits have reached conflicting decisions on this same issue.**

Two other circuits that have addressed this issue have reached conflicting conclusions.

In *Owens v. United States*, the First Circuit determined that an ineffective assistance counsel of claim based on the failure to object to a courtroom closure does not require proof of prejudice because the error is structural and is not subject to harmless error analysis:

> If the failure to hold a public trial is structural error, and it is impossible to determine whether a structural error is prejudicial, we must then conclude that a defendant who is seeking to excuse a procedurally defaulted claim of structural error need not establish actual prejudice.[19]

This analysis is rooted in the First Circuit's determination that the nature of the error defies harmless-error analysis.[20] In reaching this conclusion,

---

[19] *Owens v. United States*, 483 F.3d 48, 64 (1st Cir. 2007)(citations omitted).

[20] *Owens*, 483 F.3d at 63-64. *See also United States v. Canady*, 126 F.3d 352, 364 (2d Cir. 1997) ("We add that if we were to hold that the error [violating the right to a public trial] was not structural and thus subject to harmless error analysis, it would almost always be held to be harmless.").

however, the First Circuit essentially declined to follow *Francis v. Henderson*, asserting that *Henderson* had been "substantially weakened" in light of subsequent cases including *Fulminante*.[21]

In contrast, in *Purvis v. Crosby*, the Eleventh Circuit determined that the habeas petitioner was required to prove prejudice under *Strickland* in order to prevail on a claim that the State trial court improperly closed the courtroom.[22] The closure in *Purvis* occurred during the testimony of single witness – the young complaining witness – and some members of the public were allowed to remain.[23] Even so, the Eleventh Circuit examined this partial closure as a structural error and determined that *Strickland* required proof of actual prejudice:

> We cannot dispense with the prejudice requirement for attorney error of this type without defying the Supreme Court's clear holding that except in three limited circumstances [described in *Strickland*], which are not present here, a defendant must show that any error his counsel committed "actually had an adverse effect on the defense." *That means he must prove a reasonable probability of a different result.*[24]

---

[21] *Owens*, 483 F.3d at 65 n. 14.

[22] *Purvis v. Crosby*, 451 F.3d 734, 741 (11th Cir. 2006).

[23] *Purvis*, 451 F.3d at 740.

[24] *Purvis*, 451 F.3d at 741 (citation omitted; emphasis added).

Significantly, the Eleventh Circuit reasoned that its decision was required by *Henderson* and *Davis* on the standard for showing actual prejudice to overcome a default because otherwise these decisions "would be pointless."[25]

The First Circuit in *Owens* issued its decision under 28 U.S.C. § 2255 and noted that considerations of "comity and federalism might justify the requirement" that a habeas petitioner prove prejudice in its effort to distinguish *Purvis*.[26] There is no basis, however, on which to reconcile the Sixth Circuit's decision here – also a habeas case – with *Purvis*. The Sixth Circuit majority never cited *Henderson* and *Davis*, and did not explain how its procedural default analysis could be reconciled with these decisions. This Court should grant certiorari to resolve this split and to clarify the rule for proving actual prejudice where the underlying claim is structural error (the violation of the right to a public trial) when the claim is either defaulted or subject to a claim of ineffective assistance of counsel, or both. There is no clearly established Supreme Court precedent that supported the Sixth Circuit's decision here.

---

[25] *Purvis*, 451 F.3d at 743.

[26] *Owens*, 483 F.3d at 65 n. 14.

## CONCLUSION

The State of Michigan respectfully requests that this Honorable Court grant the writ of certiorari.

Michael A. Cox
Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
restucciae@michigan.gov
(517) 373-1124

Joel D. McGormley
Chief of Appellate Division
Attorneys for Petitioner

Dated: April 2010

## APPENDIX – TABLE OF CONTENTS

United States Sixth Circuit Court of Appeals
Order dated January 28, 2010 ..... 1a-1a

United States Sixth Circuit Court of Appeals
Opinion dated November 13, 2009 ..... 2a-24a

United States District Court Opinion and Order
dated February 12, 2008 ..... 25a-66a

Michigan Court of Appeals Opinion
dated August 24, 2004 ..... 67a-91a

No. 08-1322
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 28, 2010
LEONARD GREEN, Clerk

WILLIAM JOHNSON, Petitioner-Appellant, v. JERI -ANN SHERRY, WARDEN, Respondent-Appellee. ) ORDER

**BEFORE**: COLE, CLAY, and KETHLEDGE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Kethledge would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

*RECOMMENDED FOR FULL-TEXT PUBLICATION*
Pursuant to Sixth Circuit Rule 206
File Name: 09a0398p.06

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

---

WILLIAM JOHNSON,
*Petitioner-Appellant*,
v.
JERI ANN SHERRY, Warden,
*Respondent-Appellee*.

No. 08-1322

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 06-11214—Bernard A. Friedman, District Judge.

Argued: ~~June 10, 2009~~ August 7, 2009

Decided and Filed: November 13, 2009

Before: COLE, CLAY, and KETHLEDGE, Circuit Judges.

---

COUNSEL

**ARGUED**: Elizabeth L. Jacobs, LAW OFFICE, Detroit, Michigan, for Appellant. Andrew L. Shirvell, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF**: Elizabeth L. Jacobs, LAW OFFICE, Detroit, Michigan, for Appellant. Brian O. Neill, OFFICE OF

THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

CLAY, J., delivered the opinion of the court, in which COLE, J., joined. KETHLEDGE, J. (pp. 12–15), delivered a separate dissenting opinion.

---

OPINION

---

CLAY, Circuit Judge. Petitioner William Johnson ("Johnson") appeals the district court's judgment denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On appeal, he argues that the state violated his Sixth Amendment right to a public trial when it excluded the public from the courtroom during portions of his jury trial and that his Sixth Amendment right to effective assistance of counsel was violated when his trial attorney failed to object to the closure. For the reasons that follow, we **VACATE** the judgment of the district court and **REMAND** for an evidentiary hearing.

## I. BACKGROUND

### A. Procedural History

On January 10, 2003, a jury convicted Johnson of one count of second degree murder in violation of Michigan Compiled Laws ("MCL") § 750.317; three counts of assault with intent to commit murder in violation of MCL § 750.83; and possession of a firearm during the commission of a felony in violation of MCL § 750.227b. Johnson was sentenced to concurrent prison terms of thirty-five to sixty years for the murder

conviction and twenty to forty years each for the assault convictions, to be served consecutive to a two-year term for the felony firearm conviction.

Johnson timely filed a motion for a new trial and requested an evidentiary hearing, but his motion was denied. His convictions were affirmed on direct appeal, and the Michigan Supreme Court denied his application for leave to appeal. Johnson timely filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan and his petition was denied on February 12, 2008. Johnson timely filed a notice of appeal, along with a request for a certificate of appealability ("COA") on numerous issues. The district court granted a partial COA, certifying Johnson's claims that he was denied his right to a public trial and that his attorney was ineffective in failing to object to the closure of the courtroom. This Court entered an order stating that only the claims certified by the district court would be heard.

### B. Substantive Facts

The Michigan Court of Appeals outlined the facts underlying Johnson's convictions as follows:

> Defendant's convictions arise from the fatal shooting of Carlos Davis and non-fatal shooting assaults of James Mathis, Larry Lewis and Robert Richards outside a dance hall in Hamtramck on March 3, 2002. The shootings occurred after the victims and several other persons left the hall after a large brawl broke out among

partygoers. Only two persons, Robert Richards and Damon Ramsuer, reported seeing the shooter.

Richards told the police that he saw the shooter, and he gave a detailed description of his clothing. The police obtained photographs taken by a hired photographer before the fight broke out, and showed the photographs to Richards, who identified defendant as the shooter from one of these photographs. Richards identified [Johnson] at the preliminary examination, but Richards was killed before defendant's trial. His preliminary examination testimony was read [to the jury] at trial.

The police also interviewed Ramsuer, who signed a statement declaring that he saw the shooter. Ramsuer also identified defendant from the party photographs. Ramsuer failed to appear for the preliminary examination. When he testified at trial, he denied seeing the shooter, denied telling the police that he saw the shooter, and denied making an identification. The prosecutor impeached him with the signed statement, and with the testimony of the officer who took the statement. . . .

At the start of trial, the prosecutor moved to close the courtroom to spectators during the testimony of three

> prosecution witnesses, Mathis, Lewis, and Ramsuer, who were afraid to testify publicly. The prosecutor explained that two other prosecution witnesses had been killed under suspicious circumstances: Richards was killed in his bed, and Elvin Robinson was killed before the preliminary examination. Defense counsel agreed to exclude spectators for these witnesses, but asked the trial court not to do so in the jury's presence. The trial court never removed anyone from the courtroom, but instead instructed defendant's relatives not to arrive before 11:00 a.m. on the day that Mathis, Lewis, and Ramsuer testified, and to remain outside the courtroom until permitted to enter.

(R. at 85-86.)

Following his conviction, Johnson filed a motion for a new trial claiming denial of the right to a public trial. In denying the motion, the trial court noted that counsel agreed to the suggested closure and that counsel asked members of Johnson's family not to appear in the courtroom until after 11:00 a.m. the following day. After exhausting this claim and an ineffective assistance of counsel claim in the state courts, Johnson filed a petition for habeas relief in federal district court pursuant to 28 U.S.C. § 2254. Among other claims, Johnson claimed that his right to a public trial was violated and that counsel was ineffective for failing to assert that right. In the district court's opinion denying habeas relief, the court held

that Johnson's claim was procedurally defaulted, providing the following explanation:

> [I]n this case, Respondent's procedural default argument is not based upon defendant's failure to object, it is based upon his consent, through counsel, to the courtroom closure. Respondent argues that this acquiescence constituted a waiver of this claim. The Court finds that Petitioner waived his right to a public trial by his acquiescence, through his attorney, to the closure.

(R. at 1602.) The district court also explained, in the alternative, that the claim would fail on the merits:

> The Court finds that the state court's conclusion was a reasonable application of *Waller*. While the trial court's findings could have been more clearly articulated on the record, it was, as observed by the Michigan Court of Appeals, a reasonable conclusion that the suspicious deaths of two witnesses had, in the trial court's opinion, sparked enough fear in three witnesses and sufficiently placed their well-being at risk to override Petitioner's right to a public trial. The trial court limited the closure to just three witnesses and ensured that the closure would not be evident to the jury. Considering these circumstances, the Court finds that the state court's application of the *Waller* factors was not unreasonable.

(R. at 1603.)

With respect to Johnson's ineffective assistance of counsel claim, the Michigan Court of Appeals concluded that "trial counsel's acquiescence was neither objectively unreasonable, nor outcome-determinative." (R. at 1148.)[1] The district court agreed, holding that because "the decision to close the courtroom for a limited time was not an unreasonable application of *Waller* . . . Petitioner has failed to establish that the failure to object to the closure fell 'outside the wide range of professionally competent assistance'" as required by *Strickland v. Washington*, 466 U.S. 668, 689 (1984). (R. at 1611.)

## II. DISCUSSION

### A. Standard of Review

Because Johnson filed his habeas petition in 2006, his petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Benge v. Johnson*, 474 F.3d 236, 241 (6th Cir. 2007). Under the AEDPA, Johnson may obtain relief only if he can show that the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), or that the state court relied on an "unreasonable determination of the facts in light of the

---

[1] It is unclear what "outcome determinative" means, because, as discussed below, if the counsel's actions resulted in a closure that was unjustified or broader than necessary, prejudice would be presumed.

evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). In reviewing a district court's decision to grant or deny habeas relief, this Court reviews questions of fact under a "clearly erroneous" standard and questions of law *de novo*. *Carson v. Burke*, 178 F.3d 434, 436 (6th Cir. 1999).

### B. Analysis

Johnson's appeal presents two interrelated issues: (1) whether his Sixth Amendment right to a public trial was violated when the court closed the courtroom during the testimony of three prosecution witnesses; and (2) whether trial counsel was constitutionally ineffective for failing to object to the closure.

The Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI; *see also In re Oliver*, 333 U.S. 257, 278 (1948) (holding this right to be binding on the states through the due process clause of the Fourteenth Amendment). "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (internal quotation marks and citations omitted). Because of the "'great, though intangible, societal loss that flows' from closing courthouse doors," the denial of a right to a public trial is considered a structural error for which prejudice is presumed. *Id.* at

50 n.9 (quoting *People v. Jones*, 47 N.E.2d 1335, 1340 (N.Y. 1979)). In light of these concerns, to justify the closure of a courtroom over the objections of a defendant, "the party seeking to close [a public] hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* at 48 (applying the test set forth in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984), to a Sixth Amendment public trial claim).[2]

In the instant case, the prosecution moved to close the courtroom during the testimony of three prosecution witnesses. The prosecutor informed the court that two witnesses had been killed "under very suspicious grounds" near the time of the preliminary examination and that a number of the remaining witnesses were afraid to testify at trial. (R. at 138-39.) The trial court expressed concerns regarding the closure, stating that the prosecutor was "treading on some very dangerous ground," and inquired "[w]ell, if

---

[2] The four-part test discussed above was first developed in *Press-Enterprise*, 464 U.S. at 510, which addressed the First Amendment right to public jury selection. The *Waller* Court adopted the test in the context of the Sixth Amendment right to a public trial, explaining that "there can be little doubt that the explicit *Sixth Amendment* right of the accused is no less protective of a public trial than the implicit *First Amendment* right of the press and public." 467 U.S. at 46 (emphasis added).

these persons are essentially being protected . . . what is their concern about?" (R. at 138-40.) Nonetheless, defense counsel acquiesced to the closure, stating:

> Judge, let me make this very simple. Mr. Johnson and I have discussed this issue since [the prosecution] brought it to my attention. If the Court wants to do that, [i.e., close the courtroom], we don't really have any objection to it for those certain witnesses. The only thing I'm concerned about is that we do it well away from the jury; that either we excuse, you know, so it doesn't look like it's some weird circumstance. I mean, I don't have any problem.

(R. at 387.) The court accepted defense counsel's position without making further inquiry or findings, and defense counsel instructed members of Johnson's family to remain outside of the courtroom during the testimony at issue.

Johnson concedes that his attorney acquiesced to the closure, but argues that because the right to a public trial is a fundamental constitutional right and a structural guarantee, his attorney's statements were insufficient to constitute waiver. While we agree that the right to a public trial is an important structural right, it is also one that can be waived when a defendant fails to object to the closure of the courtroom, assuming the justification for closure is sufficient to overcome the public and media's First Amendment right to an open and public trial proceeding. *See Freytag v. Commissioner*, 501 U.S. 868,

896 (1991) ("[T]he Sixth Amendment right to a trial that is 'public,' provide[s] benefits to the entire society more important than many structural guarantees; but if the litigant does not assert [it] in a timely fashion, he is foreclosed.") (collecting cases); *see also Peretz v. United States*, 501 U.S. 923, 936-37 (1991) (citing *Levine v. United States*, 362 U.S. 610, 619 (1960)). Because Johnson failed to object to the closure, his claim is procedurally defaulted unless he can show cause and prejudice for the default. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

The doctrine of procedural default provides:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

*Id.* Here, it is undisputed that Johnson failed to make a contemporaneous objection to the closure, which is required by an "independent and adequate state procedural rule." *United States v. Frady*, 456 U.S. 152, 168 (1982). It is also evident that the last state court from which Johnson sought review invoked the state procedural rule as a basis for its decision to reject review of the claim. (*See* R. at 86 (state court of appeals stated that Johnson "expressly waived his right by

assenting to the trial court's decision to close the courtroom during the three witnesses' testimony." (citations omitted).) Thus, the district court found that Johnson's claim was denied based on an independent and adequate state procedural rule.[3]

Under these circumstances, federal habeas review of Johnson's public trial claim is barred unless Johnson can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. Johnson argues

---

[3] Johnson argues that the state procedural default was not an independent and adequate state ground barring subsequent federal review because Michigan courts "regularly waive contemporaneous objection defaults where the issue is perceived to concern constitutional due process rights" and that, here, the state court did so when it reached the merits of his public trial claim. (Johnson's Reply Br. 4.) However, while the state court did discuss the merits of Johnson's public trial claim, it clearly did so as an *alternative* basis for denying the claim, and the procedural default rule applies. (*See* R. at 86 ("[D]efendant expressly waived his right by assenting to the trial court's decision. . . . Moreover, the right to a public trial is not absolute . . . .")); *see also Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) ("[A] state court need not fear reaching the merits of a federal claim in an *alternative* holding. . . . [R]econsideration of the federal issue on federal habeas [is curtailed] as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision.") (emphasis in original).

that he has demonstrated cause for the default because his counsel was ineffective in failing to object to the closure of the trial. Consequently, both of Johnson's claims on appeal turn on whether his counsel was constitutionally ineffective.[4]

In order to establish ineffective assistance of counsel, a defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness," and that "the deficient performance prejudiced [his] defense." *Strickland*, 466 U.S. at 687-88. In the instant case, we agree that defense counsel's failure to object to the closure of Johnson's trial may have fallen below an "objective standard of reasonableness" as required in *Strickland*. Courts have been clear that while the closure of a trial may be justified in certain cases, "[s]uch circumstances will be rare. . . and the balance of interests must be struck with special care." *Waller*, 467 U.S. at 45; *see also Press-Enterprise*, 464 U.S. at 510 (holding that a closure may be justified only by "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest"); *Owens v. United States*, 483 F.3d 48, 64 (1st Cir. 2007) (holding that the failure to object to the courtroom closure for a day of jury selection deprived defendant of a substantial fair trial right).
Counsel's failure to object to the closure of the courtroom during the testimony of three key

---

[4] Attorney error can only constitute cause if it constitutes ineffective assistance of counsel under the test enunciated in *Strickland*, 466 U.S. 668. *See Coleman*, 501 U.S. at 752; *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986).

prosecution witnesses, arguably the most important phase of Johnson's trial, denied Johnson a substantial fair trial right and counsel should have approached the issue with caution.

Given the absence of on-the-record findings by the trial court, it is difficult for us to discern whether it was necessary for the courtroom to be closed to all spectators for the testimony at issue. However, on the record before us, we are far from convinced that this was the "rare" circumstance where closure was justified, or that the closure was "no broader than necessary" to protect the interest advanced by the state under *Waller*, 467 U.S. at 48. While the prosecution made general allegations that two prosecution witnesses—Elvin Robinson and Robert Richards—had been murdered, Johnson stresses that another individual was charged with the stabbing of Elvin Robinson, and the prosecution offered no proof that Johnson or any member of Johnson's family was involved in the death of those individuals. *See Waller*, 467 U.S. at 48 (requiring the party seeking the closure to provide specific evidence of an overriding interest that was likely to be prejudiced). The prosecution presented no witnesses or evidence in support of the closure, and did not point to any incidents in which the witnesses at issue had been threatened or otherwise contacted by any member of Johnson's family. In fact, both the court and the prosecution acknowledged that

the request was on thin or dangerous ground.[5] Notwithstanding these circumstances, defense counsel made no effort to limit the closure to less than three witnesses, or to ensure that the excluded individuals be limited to those individuals who might be perceived as a threat to the witnesses. Under these circumstances, defense counsel's acquiescence to the closure appears unjustified.[6]

To be sure, counsel's decision would be owed deference if it could be viewed as strategic, and counsel may have been privy to information of which we are unaware. *See Strickland*, 466 U.S. at 689 (explaining that a defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy). For example, defense counsel may have known that Johnson's family members had a history of contact with the relevant

---

[5] The prosecutor stated that "[t]he only case law I really found deals with small children [who we]re intimidated by someone present in those cases," acknowledged that his motion was on "very thin ground," and noted that he was sure that defense counsel would have an objection to the closure. (R at 138-39.) When the prosecution requested closure, the trial court stated that the prosecutor was "treading on some very dangerous ground." (*Id.* at 138.)

[6] Johnson alleges that the family members who were excluded included four aunts, ranging from 38 to 50 years in age, and a female first cousin who was 38 years old. Johnson's Br. 7. In *In re Oliver*, 333 U.S. 257, 272 (1948), the Supreme Court explained that a defendant has a particularly compelling interest in having his family present at his trial.

witnesses or he may have known more about the nature of the alleged witness killings than the record revealed. However, if counsel had additional relevant information, it is not evident from the record. No court below conducted an evidentiary hearing to explore these matters, and, on the record before us, it is difficult to see how the failure to object to the closure could have been strategic. *See id; see also Owens*, 483 F.3d at 66 (remanding for an evidentiary hearing when there was no indication that counsel's failure to object to a closure was strategic).

Consequently, an evidentiary hearing is warranted to determine if trial counsel's failure to object to the closure constitutes deficient performance. If Johnson can establish that counsel's performance was deficient, he will also be required to demonstrate that he was prejudiced by the error. *See Coleman*, 501 U.S. at 750 (requiring a showing of prejudice to excuse procedural default of a claim); *Strickland*, 466 U.S. at 687 (requiring a showing of prejudice to establish ineffective assistance of counsel). There would be no prejudice—either with respect to Johnson's ineffective assistance of counsel claim or with respect to the showing of prejudice necessary to excuse procedural default—if the government's interest in closure was so compelling that the closure at issue would have been ordered notwithstanding counsel's objection. However, in light of the compelling interest in a public trial and the rigorous test set forth in *Waller*, we are far from confident that the closure would have been implemented as suggested by the prosecution over Johnson's objections. Because the right to a public trial is a structural guarantee, if the closure were unjustified or broader than necessary, prejudice would

be presumed. *See Waller*, 467 U.S. at 50 n.9; *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) (citing *Waller* for the proposition that "violation of the public-trial guarantee is not subject to harmlessness review because 'the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance'"). Consequently, if evidence reveals that counsel's failure to object fell below an objective standard of reasonableness, there is a strong likelihood that counsel's deficient performance would be deemed prejudicial.[7]

In sum, we are deeply concerned by the lack of attention afforded to Johnson's fundamental right to a public trial and conclude that further exploration of

---

[7] As discussed in *Owens*, 483 F.3d at 64 n.13, Johnson must make two showings of prejudice. First, he must show that counsel's failure to object to the trial closure prejudiced him for purposes of determining whether there was ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. Second, he must show prejudice to excuse his procedural default on the public trial claim. *Coleman*, 501 U.S. at 750. As was true in *Owens*, "[w]e believe that these showings of prejudice overlap, and we [address] them simultaneously." 483 F.3d at 64 n.13; *Cf. Strickler v. Greene*, 527 U.S. 263, 282 (1999) ("In this case, cause and prejudice [for procedural default] parallel two of the three components of the alleged [trial error] itself.")

this issue is warranted.[8] On this record, it is virtually impossible to determine whether the closure of the trial was justifiable. Once further facts are available, the district court will be better equipped to determine whether closure of the trial was justified, whether trial counsel was constitutionally ineffective for failing to object, and whether the cause and prejudice components of Johnson's public trial claim can be satisfied.

---

[8] While defense counsel's objection triggers the trial court's duty to make factual findings under *Waller*, the court could have averted the issues presented in this appeal by conducting a detailed inquiry before agreeing to the prosecutor's request. The Supreme Court has made clear that trial closures infringe upon an important structural guarantee and that they should be rare. *Waller*, 467 U.S. at 45. Moreover, while First Amendment issues were not raised in this case, the public and the press also have a compelling First Amendment interest in a public trial. *See Press-Enterprise*, 464 U.S. at 509-10 ("[The] circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one.") (internal quotation marks and citation omitted). Given the great, though intangible, societal loss that flows from closing courthouse doors, *Waller*, 467 U.S. at 50 n.9, a prudent court should carefully scrutinize a party's request before agreeing to close a courtroom.

## CONCLUSION

For the reasons stated above, we **VACATE** the district court's judgment denying habeas relief and **REMAND** for an evidentiary proceeding to determine whether the trial closure was justifiable, whether trial counsel was constitutionally ineffective for failing to object, and whether the cause and prejudice components of Johnson's public trial claim can be satisfied.

## DISSENT

KETHLEDGE, Circuit Judge, dissenting. In defending a murder charge, it is a bad idea, I think, to leave the judge with a smoldering suspicion that your client had a role in killing two of the prosecution's key witnesses before trial. A lawyer who minimizes that danger—by consenting to, rather than fighting, closure of the courtroom during the testimony of three surviving witnesses, out of a total of 18 testifying witnesses in the case—does not thereby render constitutionally ineffective assistance of counsel. That is all the more true, in my opinion, when there is not a shred of evidence that the closure had the slightest effect on the trial's outcome.

The majority concludes otherwise. The majority suggests that the closure fight here was one worth having—indeed, that it was constitutionally mandated—its ethereal upside and concrete downside notwithstanding. The majority then sidesteps the absence of any actual prejudice resulting from Johnson's consent to the closure—and with it, the

plainly stated actual-prejudice requirement of *Strickland v. Washington*, 466 U.S. 668 (1984)—by holding that Johnson need not show any prejudice at all in support of his ineffective-assistance-of-counsel claim. That holding is not supported by "clearly established Federal law, as determined by the Supreme Court," 28 U.S.C. § 2254(d)(1), which means that we are without power to impose it on the Michigan state courts in this habeas case. I respectfully dissent.

* * *

The majority and I agree that Johnson's habeas petition fails unless he can prove his ineffective-assistance-of-counsel claim. To prove that claim, Johnson must first show that his "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. That showing requires, of course, proof that counsel committed errors in the first place. Second, Johnson "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. We review for an abuse of discretion a district court's decision whether to hold an evidentiary hearing on these issues. *See Ivory v. Jackson*, 509 F.3d 284, 297 (6th Cir. 2007).

The district court did not abuse its discretion here, because Johnson's claim clearly fails on both grounds. First, prior to trial, two witnesses identified Johnson as the shooter in a barrage that left Carlos Davis dead, Larry Lewis and James Mathis wounded, and Robert Richards untouched by the bullets that Johnson fired toward him.

Richards was unavailable to testify at trial—because he had been shot to death, in bed, after his testimony at Johnson's preliminary exam. Another prosecution witness, Elvin Robinson, was shot to death before he was able to testify at Johnson's exam. At trial, the prosecution moved to close the courtroom during the testimony of three surviving witnesses: Damon Ramsuer, who was the sole surviving witness to have identified Johnson as the shooter; and Lewis and Mathis, two of the persons Johnson shot. In support of its motion, the prosecution explained that all three witnesses were "literally terrified" and were "cowering, refusing to come to court, even under threat of being arrested, because they [were] afraid for their lives." Johnson's counsel chose not to pick this particular fight—truly a strategic decision if there ever was one—and, after consulting with Johnson, affirmatively agreed to the three-witness closure.

The question before us is whether that decision was so far outside the bounds of competent representation as to amount to constitutionally ineffective assistance of counsel. I do not think the decision can possibly be seen that way. Having reviewed the trial transcript, it seems to me instead that the decision was *correct*. Johnson's counsel essentially agreed to close the courtroom during the testimony of three witnesses, out of a total of 18 witnesses at trial. Strategically the net effect of that closure, as Johnson now describes it, was that several of his "female relatives" did not witness the testimony of those three witnesses. In return, Johnson's counsel deflected the trial judge from a line of inquiry—as to why, exactly, these three witnesses were so terrified to

testify against Johnson—that almost certainly would have reflected poorly on his client. That avoidance appears all the wiser given that it emerged at Johnson's sentencing—and perhaps could have emerged sooner, had Johnson's counsel fought the closure—that Richards was shot to death with ammunition from the same lot that Johnson used to kill Davis and wound Lewis and Mathis. The Constitution, suffice it to say, permitted this strategic choice.

Second, there is no evidence in the record—which includes the entire transcript of Johnson's trial—that Johnson's consent to closure as to three witnesses had any effect on the outcome of his murder trial. The majority does not assert the contrary. Instead, the majority holds, "[b]ecause the right to a public trial is a structural guarantee, if the closure were unjustified or broader than necessary, prejudice would be presumed." Maj. Op. at 10. In so holding the majority drives right past the distinction between a *Waller* claim and a *Strickland* one. What the majority says is true enough for a *Waller* claim, but Johnson's petition undisputedly turns on a *Strickland* one; and *Strickland* repeatedly and unequivocally says that *actual prejudice* is required. *See, e.g.*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding would have been different*") (emphasis added); *id.* at 693 ("It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding").

Reasonable jurists can disagree as to whether, when a defendant asserts an ineffective-assistance claim based on an underlying violation of his right to a public trial, the *Waller* definition of prejudice should trump the *Strickland* one, or vice versa. In a lengthy analysis of this very issue, the Eleventh Circuit held that the *Strickland* actual prejudice requirement applies. *See Purvis v. Crosby*, 451 F.3d 734, 743 (11th Cir. 2006). (Our decision today directly conflicts with that decision.) The First Circuit has held that the *Waller* definition prevails, see *Owens v. United States*, 483 F.3d 48, 64-66 & n.14 (1st Cir. 2007)—although, critically, it did so in considering a challenge to an underlying *federal* conviction, *see* 28 U.S.C. § 2255, and thus was not limited, as we are here, to deciding whether "*clearly established* Federal law, as determined by the Supreme Court," requires that result. *Id.* § 2254(d)(1) (emphasis added). But I simply do not see how, when Johnson presents a *Strickland* claim and *Strickland* by its terms imposes an *actual-prejudice* standard, we can hold that clearly established Supreme Court precedent required the Michigan state courts to apply a presumed-prejudice standard instead.

What has been clearly established for decades is that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland*, 466 U.S. at 689. Johnson has not touched that presumption here. I respectfully dissent.

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

WILLIAM JOHNSON,

Petitioner,

v. Case Number: 2:06-CV-11214
HON. BERNARD A. FRIEDMAN

JERI-ANN SHERRY,

Respondent.
_____/

**OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS**

## I. Introduction

Petitioner William Johnson, through counsel, has filed a petition for a writ of habeas corpus. Petitioner is currently incarcerated at the Chippewa Correctional Facility in Kincheloe, Michigan, pursuant to convictions for second-degree murder, three counts of assault with intent to commit murder, and possession of a firearm during the commission of a felony. For the reasons set forth below, the Court denies the petition.

## II. Background

Petitioner's convictions arise from events that occurred outside a BHA Hall in Hamtramck, Michigan. The Michigan Court of Appeals summarized the facts as adduced at Petitioner's trial as follows:

Defendant's convictions arise from the fatal shooting of Carlos Davis and nonfatal shooting assaults of James Mathis, Larry Lewis and Robert Richards outside a dance hall in Hamtramck on March 3, 2002. The shootings occurred after the victims and several other persons left the hall after a large brawl broke out among partygoers. Only two persons, Robert Richards and Damon Ramsuer, reported seeing the shooter.

Richards told police that he saw the shooter, and he gave a detailed description of [the shooter's] clothing. The police obtained photographs taken by a hired photographer before the fight broke out, and showed the photographs to Richards, who identified defendant as the shooter from one of these photographs. Richards identified defendant at the preliminary examination, but Richards was killed before defendant's trial. His preliminary examination testimony was read at trial.

The police also interviewed Ramsuer, who signed a statement declaring that he saw the shooter. Ramsuer also identified defendant from the party photographs. Ramsuer failed to appear for the preliminary examination. When he testified at trial, he denied seeing the shooter, denied telling police that he saw the shooter, and denied making an

> identification. The prosecutor impeached him with the signed statement, and with the testimony of the officer who took the statement.

Johnson, slip op. at 1.

### III. Procedural History

Following a jury trial in Wayne County Circuit Court, Petitioner was convicted of second-degree murder, three counts of assault with intent to murder, and possession of a firearm during the commission of a felony. On February 13, 2003, Petitioner was sentenced to 35-60 years imprisonment for the murder conviction, 20-40 years imprisonment for each of the assault convictions, all to be served concurrently with one another and consecutively to two years imprisonment for the felony-firearm conviction.

Petitioner filed a motion for a new trial and for an evidentiary hearing. He requested an evidentiary hearing regarding his claims that he was denied his right to a public trial and that he was denied the effective assistance of counsel. The trial court denied Petitioner's motions. People v. Johnson, No. 02-012133-01 (Wayne County Circuit Court Sept. 30, 2003).

Petitioner filed an appeal of right in the Michigan Court of Appeals, raising the following claims:

> I. Where the court excluded the public including Appellant's family from the courtroom while three witnesses testified, was Appellant's constitutional right to a public trial violated?

II. Did prosecutorial misconduct deny due process of law in the following ways:

a. The prosecutor's arguments denigrated defense counsel before the jury, thus diluting the presumption of innocence. The argument acted as a comment on his right to counsel, the right to the effective assistance of counsel, and the right to present a defense;

b. The prosecution's strategy introducing and arguing the element of fear before the jury constituted prosecutorial misconduct and denied Appellant a fair trial and due process of law; and

c. The prosecutor commented on the defendant's exercise of his right to remain silent and right not to testify and he shifted the burden of proof?

III. Was Appellant denied a fair trial when the trial judge told the jury over objection that the prosecution's only eyewitness was unavailable because he was deceased?

IV. Was Appellant denied the effective assistance of counsel in the following ways:

a. Defense counsel failed to object to the closing of the courtroom to the public;

b. Defense counsel's decision to call Janard Thomas and Letrulia Johnson as witnesses was an unreasonable strategy;

c. Defense counsel opened the door to testimony on fear;

d. Defense counsel failed to object to prosecutorial misconduct; and

e. Defense counsel failed to call an eyewitness whose testimony would have been exculpatory?

V. Did the trial court err in failing to hold a hearing on whether the out-of-court identification and the in-court identification were the result of an impermissibly suggestive procedure, where a group shot from the party was displayed to the eyewitness and the only person in the photo whose clothing matched the description of the perpetrator was the Appellant. Was Appellant also denied his right to counsel where the investigation had focused on but an attorney was not present at the identification procedure?

VI. Was Appellant denied due process of law and his right to a proportionate sentence where the court erred in the scoring of the guidelines and erred in its decision to exceed the guidelines?

The Court of Appeals granted Petitioner's motion to file a supplemental brief, adding the following additional claim:

> VII. Did the sentence imposed by the court violate Appellant's right to trial by jury, the right to due process of law, and the right to be free from excessive punishment?

The Michigan Court of Appeals affirmed Petitioner's convictions and sentences. People v. Johnson, No. 247227 (Mich. Ct. App. Aug. 24, 2004). Petitioner filed a motion for reconsideration on the ground that the trial court failed to address the issue raised in his supplemental brief. The court of appeals denied the motion for reconsideration. People v. Johnson, No. 247227 (Mich. Ct. App. Sept. 30, 2004).

Petitioner filed an application for leave to appeal in the Michigan Supreme Court, raising the same claims raised before the Michigan Court of Appeals. The Michigan Supreme Court denied leave to appeal because it was "not persuaded that the questions presented should be reviewed by this Court." People v. Johnson, No. 127293 (Mich. May 31, 2005).

Petitioner, through counsel, then filed the pending petition for a writ of habeas corpus, raising the following claims:

> I. Where the court excluded the public including Petitioner's family from the courtroom while three prosecution witnesses testified, was Petitioner's constitutional right to a public trial violated?

II. Did prosecutorial misconduct deny Petitioner due process of law in the following ways:

a. The prosecution's strategy introducing and arguing the element of fear of the defendant was fundamentally unfair;

b. The prosecution's argument denigrated defense counsel before the jury thus diluting the presumption of innocence. The argument acted as a comment on his right to counsel, the right to the effective assistance, and the right to present a defense;

c. The prosecutor commented on the defendant's exercise of his right to remain silent and right not to testify and he shifted the burden of proof?

III. Was Petitioner's right to a fair trial denied when the trial judge told the jury over objection that the prosecution's only eyewitness was unavailable because he was deceased?

IV. Was Petitioner denied the effective assistance of counsel in the following ways:

a. Defense counsel failed to object to the closing of the courtroom to the public;

b. Defense counsel's decision to call Janard Thomas and Letrulia Johnson

as witnesses was an unreasonable strategy;

c. Defense counsel opened the door for testimony on fear;

d. Defense counsel failed to object to prosecutorial misconduct; and

e. Trial counsel failed to call an eyewitness whose testimony would have been exculpatory?

V. Did the trial court err in failing to hold a hearing on whether the out-of-court identification and the in-court identification were the result of an impermissibly suggestive procedure where a group photo taken at the party was displayed to the eyewitness and the only person in that photo whose clothing matched the description of the perpetrator was the Petitioner? Was Petitioner also denied his right to counsel where the investigation had focused on Petitioner but an attorney was not present at the identification procedure?

VI. Was Petitioner denied due process of law and was his right to a jury trial denied where his sentence was based on guideline factors not found by a jury to have been proven beyond a reasonable doubt?

## IV. Standard of Review

28 U.S.C. § 2254(d) imposes the following standard of review that a federal court must utilize when reviewing applications for a writ of habeas corpus:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). Therefore, federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. Franklin v. Francis, 144 F.3d 429 (6th Cir. 1998). Additionally, this Court must presume the correctness of state court factual

determinations. 28 U.S.C. § 2254(e)(1)[1]; *see also* Cremeans v. Chapleau, 62 F.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous").

The United States Supreme Court has explained the proper application of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . .
>
> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor, 120 S. Ct. 1495, 1519-20 (2000).

---

[1] 28 U.S.C. § 2254(e)(1) provides, in pertinent part:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

With respect to the "unreasonable application" clause of § 2254(d)(1), the United States Supreme Court held that a federal court should analyze a claim for habeas corpus relief under the "unreasonable application" clause when "a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case." Id. at 1521. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable. . .
>
> [A]n unreasonable application of federal law is different from an incorrect application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 1521-22.

## V. Analysis

### A. Right to a Public Trial

Petitioner argues that his Sixth Amendment right to a public trial was violated when the trial court

closed the courtroom to the public during the testimony of three prosecution witnesses. The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The right is applicable to the states through the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968).

"The central aim of a criminal proceeding must be to try the accused fairly." Waller v. Georgia, 467 U.S. 39, 46 (1984). The public-trial guarantee was created to further that aim. Id., *citing* Gannett Co. V. DePasquale, 443 U.S. 368, 380 (1979). A public trial helps to ensure that judge and prosecutor carry out their duties responsibly, encourages witnesses to come forward, and discourages perjury. Id. The violation of the constitutional right to a public trial is a structural trial error, not subject to the harmless error analysis. Id. at 49-50, n.9.

A closure does not violate the Sixth Amendment where: (1) the party seeking to close the courtroom advances an overriding interest that is likely to be prejudiced by an open courtroom; (2) the party seeking closure demonstrates that the closure is no broader than necessary to protect that interest; (3) the trial court considers reasonable alternatives to closing the proceeding; and (4) the trial court makes findings adequate to support the closure. Id. at 48.

Respondent argues that this claim is procedurally defaulted. The doctrine of procedural default provides:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default, and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). Such a default may occur if the state prisoner files an untimely appeal, Coleman, 501 U.S. at 750, if he fails to present an issue to a state appellate court at his only opportunity to do so, Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994), or if he fails to comply with a state procedural rule that required him to have done something at trial to preserve his claimed error for appellate review, e.g., to make a contemporaneous objection, or file a motion for a directed verdict. United States v. Frady, 456 U.S. 152, 167-69 (1982); Simpson v. Sparkman, 94 F.3d 199, 202 (6th Cir. 1996). Application of the cause and prejudice test may be excused if a petitioner "presents an extraordinary case whereby a constitutional violation resulted in the conviction of one who is actually innocent." Rust, 17 F.3d at 162; Murray v. Carrier, 477 U.S. 478, 496 (1986).

A state procedural default is not an "independent and adequate state ground" barring subsequent federal review unless the state rule was "firmly established and regularly followed" at the time

it was applied. Ford v. Georgia, 498 U.S. 411, 423-24 (1991). Additionally, the last state court from which the petitioner sought review must have invoked the state procedural rule as a basis for its decision to reject review of the petitioner's federal claim. Coleman, 501 U.S. at 729-30. "When a state court judgment appears to have rested primarily on federal law or was interwoven with federal law, a state procedural rule is an independent and adequate state ground only if the state court rendering judgment in the case clearly and expressly stated that its judgment rested on a procedural bar." Simpson, 94 F.3d at 202.

If the last state court from which the petitioner sought review affirmed the conviction both on the merits, and, alternatively, on a procedural ground, the procedural default bar is invoked and the petitioner must establish cause and prejudice in order for the federal court to review the petition. Rust, 17 F.3d at 161. If the last state court judgment contains no reasoning, but simply affirms the conviction in a standard order, the federal habeas court must look to the last reasoned state court judgment rejecting the federal claim and apply a presumption that later unexplained orders upholding the judgment or rejecting the same claim rested upon the same ground. Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

This Court begins its analysis of whether Petitioner's claim is procedurally defaulted by looking to the last reasoned state court judgment denying Petitioner's claim. *See* Coleman, 501 U.S. at 729-30. The last state court to issue a reasoned opinion addressing the allegedly procedurally defaulted claim was the Michigan Court of Appeals. The state court of

appeals held that because defense counsel did not object to the exclusion of spectators, the issue was not preserved for review. Johnson, slip op. at 2.

Petitioner argues that the state court of appeals' reliance on the contemporaneous-objection rule should not serve to default his claim because, at the time of Petitioner's trial, Michigan courts regularly addressed the merits of a claim on appellate review if the claim involved a "significant constitutional question." *See* Petitioner's Reply Brief at p. 3.

This Court recently addressed a similar claim of procedural default in the context of a claimed violation of the right to a public trial and held:

> While the contemporaneous objection rule is fairly established as a preferred procedure and appears to be regularly followed as to some claims, Michigan courts regularly waived contemporaneous objection defaults at the time of Petitioner's conviction when the issue was perceived to concern "constitutional due process rights." *See, e.g.*, People v. Crear, 242 Mich. App. 158, 166 (Mich. Ct. App. 2000); *see also* People v. Wilson, 230 Mich. App. 590, 593; People v. Johnson, 215 Mich. App. 658, 669 (Mich. Ct. App. 1996); Watson v. Watson, 204 Mich. App. 318, 319 (Mich. Ct. App. 1994). State procedural requirements which are not regularly followed cannot prevent federal review of alleged constitutional

violations. Barr v. City of Columbia, 378 U.S. 146, 148 (1964). *Accord* James v. Kentucky, 466 U.S. 341, 348-49 (1984). "A rule of exception which itself depends on the perceived merits of the federal claim cannot fairly be considered 'adequate and independent' of federal law so as to preclude federal habeas review." Griffin v. Berghuis, 298 F. Supp. 2d 663, 672 (E.D. Mich. 2004), *quoting* Bentley, 239 F. Supp. 2d at 694.

Petitioner's claim that her right to a public trial was violated unquestionably presented a significant constitutional question. Michigan courts regularly waived contemporaneous objection defaults in such circumstances. Accordingly, the Court finds that the state court's decision not to address this claim was not based upon a "firmly established and regularly followed" state procedural rule and, therefore, that the claim is not procedurally defaulted. Ford, 498 U.S. at 423-24. *Cf.* Walton v. Briley, 361 F.3d 431, 434 (7th Cir. 2004) (holding that habeas petitioner had not waived right to a public trial by failing to object at trial because a right to a public trial is a fundamental trial right which may be relinquished only upon a showing that defendant knowingly and voluntarily waived such a right).

Salem v. Yukins, 414 F. Supp. 2d 687, 696-697 (E.D. Mich. 2006).

While the circumstances here are similar to those present in Salem, there is an important distinction between the two cases. In Salem, defense counsel clearly objected to the courtroom closure, but the state court held that her objection was not adequate to preserve the issue for appellate review. Thus, in Salem, whether or not defense counsel's objection was considered adequate to preserve the issue, there was no question that counsel did not acquiesce to the courtroom closure. Therefore, she did not waive the issue.

In contrast, in this case, Respondent's procedural default argument is not based upon defendant's failure to object, it is based upon his consent, through counsel, to the courtroom closure. Respondent argues that this acquiescence constituted a waiver of this claim. The Court finds that Petitioner waived his right to a public trial by his acquiescence, through his attorney, to the closure.

Moreover, even if this issue were not waived, Petitioner has failed to show that the state court's decision was contrary to or an unreasonable application of Waller. The state court, although finding that the claim was not preserved for appellate review, proceeded to address the merits of the claim for plain error. The state court applied the four requirements for courtroom closure articulated in Waller, and held, in pertinent part:

> Here, the record discloses that these four requirements were satisfied. The prosecutor showed that there was an overriding interest because three key witnesses, including two complainants, were justifiably afraid to testify because two other witnesses had been killed under suspicious circumstances. See Nieto v. Sullivan, 879 F.2d 743, 753 (10th Cir. 1989). The closure was not broader than necessary to protect these witnesses' safety, and defendant did not propose an alternative means of protecting their safety. And, though the trial court did not specifically articulate findings in support of the closure, it is apparent form the record that the trial court's decision was based on the suspicious deaths of Richards and Robinson. Defendant's contention on appeal that closure was not permitted because the witnesses were not of tender years and there was no evidence of threats is unpersuasive; nothing in Kline restricts courtroom closures to circumstances involving very young witnesses or direct threats. We are satisfied that [t]he suspicious deaths of two other witnesses were sufficient to jury concerns for the witnesses' safety.

Johnson, slip op. at 3.

The Court finds that the state court's conclusion was a reasonable application of Waller. While the trial court's findings could have been more clearly

articulated on the record, it was, as observed by the Michigan Court of Appeals, a reasonable conclusion that the suspicious deaths of two witnesses had, in the trial court's opinion, sparked enough fear in three witnesses and sufficiently placed their well-being at risk to override Petitioner's right to a public trial. The trial court limited the closure to just three witnesses and ensured that the closure would not be evident to the jury. Considering these circumstances, the Court finds that the state court's application of the Waller factors was not unreasonable.

**B. Alleged Prosecutorial Misconduct**

Petitioner alleges that the prosecutor engaged in several acts of misconduct. Specifically, Petitioner argues that the prosecutor: (i) introduced the element of fear at the trial; (ii) denigrated defense and defense counsel; and (iii) commented on Petitioner's exercise of his right to remain silent, his right not to testify, and shifted the burden of proof to Petitioner.

Respondent argues that this claim is procedurally defaulted. "[F]ederal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits." Hudson v. Jones, 351 F.3d 212, 215 (6th Cir. 2003), *citing* Lambrix v. Singletary, 520 U.S. 518, 525, 117 S. Ct. 1517, 1523 (1997). "Judicial economy might counsel giving the [other] question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law." Lambrix, 520 U.S. at 525, 117 S. Ct. at 1523. In this case, the Court finds that the interests of judicial economy are best served by addressing the merits of Petitioner's prosecutorial

misconduct claims. "Prosecutorial misconduct may warrant habeas relief only if the relevant misstatements were so egregious as to render the entire trial fundamentally unfair to a degree tantamount to a due process deprivation." Caldwell v. Russell, 181 F.3d 731, 736 (6th Cir. 1999). The determination whether the trial was fundamentally unfair is "made by evaluating the totality of the circumstances." Angel v. Overberg, 682 F.2d 605 (6th Cir. 1982). The Court must examine "'the fairness of the trial, not the culpability of the prosecutor.'" Pritchett v. Pitcher, 117 F.3d 959, 964 (6th Cir. 1997), (*quoting* Serra v. Michigan Department of Corrections, 4 F.3d 1348, 1355 (6th Cir. 1993)).

**1.**

In his first prosecutorial misconduct claim, Petitioner argues that the prosecutor improperly introduced the element of fear into the trial by his treatment of three prosecution witnesses: Robert Richards, Damon Ramsuer, and Larry Lewis. Robert Richards was the only witness who identified Petitioner as the shooter. Ramsuer identified Petitioner to police, but later denied having done so.

Richards testified at the preliminary examination, but was killed shortly thereafter. Before his preliminary examination testimony was read to the jury, the trial court informed the jury that "Mr. Richards is now deceased. You are instructed to make no inferences or draw any conclusion from that circumstance." Tr., Vol. II, p. 138. In his opening statement, the prosecutor stated: "Mr. Richards is not available to testify. The court will tell you the circumstances surrounding that." Tr. Vol. I, p. 156.

Also, during rebuttal closing argument, the prosecutor addressed the issue of why Richards waited two days before contacting police. The prosecutor stated: "We'll never know why he didn't call the police for two days, because he's not here to tell us why." Tr., Vol. III, p. 263.

The Michigan Court of Appeals, in reviewing this claim for plain error, held that the prosecutor's reference to Richards did not suggest to the jurors that Richards died under suspicious circumstances, and, therefore, did not inject the element of fear into the trial. This Court agrees with the state court's assessment.

At trial, a police detective testified that Ramsuer identified Petitioner as the shooter from a photograph taken at the party. At trial, Ramsuer denied making the identification. Petitioner objects to the prosecutor's following statements regarding witness Damon Ramsuer:

> Keep in mind, will you, what else he said; how he didn't want to be here; how he refused to come to the preliminary exam to testify; how he refused to come to court; how he had to be locked up and arrested and held overnight to testify for his friend after he picked out Mr. Johnson as the shooter.

Tr., Vol. III, p. 217.

> He doesn't identify Mr. Williams here in court. He identified him back in May. But

> now he's not doing it. Think about why he wouldn't do that in court. Think about the reasons why we had to lock him up to bring him to court to tell on his own friend, Mr. Davis, how he was murdered. Think about these reasons when you weight the credibility . . .

Id. at 266.

Ramsuer's reluctance to testify became the subject of re-cross-examination after defense counsel opened the door to such testimony by asking Ramsuer the following question: "[I]f you had seen who fired shots that might have killed Carlos Davis, there's no reason for you not to have said that, was there?" Tr., Vol. II, p. 97. Given that defense counsel opened the door to this testimony and given the dramatic change in Ramsuer's testimony, it was fair for the prosecutor to ask the jury to consider Ramsuer's motives for testifying. As the trial court judge noted, both sides were faced with the difficult task of exploring witnesses' credibility and motives for testifying without eliciting testimony that witnesses were fearful of testifying based upon the death of Richards. This Court finds that the prosecutor's arguments regarding Ramsuer's testimony carefully avoided reference to fear.

Finally, Petitioner objects to the prosecutor's statement in closing argument that Larry Lewis was fearful about what happened to him the night of the shooting. Lewis testified that he continued to suffer mental pain from the shooting and continued to relive the night. The prosecutor's argument was a fair

interpretation of Lewis' testimony and did not invoke any fear.

In sum, the prosecutor's statements, contrary to Petitioner's claims, were not extensive. They also do not represent a "flagrant and deliberate attempt to mislead they jury by directing them toward an emotional response." Petitioner's Brief at p. 18.

2.

Second, Petitioner argues that the prosecutor denigrated defense counsel thereby diluting the presumption of innocence. Petitioner also argues that the act of denigrating defense counsel served as a comment on Petitioner's exercise of his right to counsel and right to present a defense.

Petitioner argues that the prosecutor denigrated defense counsel by eliciting testimony from all defense witnesses that none of them knew they were going to be witnesses until after speaking to defense counsel. Then, in closing argument, the prosecutor stated that the defense witnesses did not talk to the police. They spoke only to defense counsel.

The Sixth Circuit Court of Appeals has held that a prosecutor has a right to cross-examine a defense witness regarding the witness's delay in coming forward. U.S. v. Aguwa, 123 F.3d 418, 420 (6th Cir. 1997). Such questioning is a permissible attack on a witness's credibility. Id.

In addition, the prosecutor's isolated reference to "Mr. Fishman's witnesses" is insufficient to rise to the level of prosecutorial misconduct. It was an isolated

statement and did not compromise the fairness of the trial.

3.

Finally, Petitioner argues that the prosecutor commented on Petitioner's exercise of his right to remain silent and not to testify and shifted the burden of proof.

First, Petitioner points to the prosecution's cross-examination of defense witness Janard Thomas. Thomas testified that he was hit on the head with a bottle while at the party, and that his cousin, Petitioner, saw him get struck on the head. The prosecutor asked whether Thomas ever asked police to prosecute the person who struck him, asked Petitioner to inform police who hit him, or told police Petitioner could identify the person who struck him.

A defendant's Fifth Amendment right against self-incrimination protects him from the prosecution's using the exercise of his right to silence after to his detriment at trial, unless it is used for the limited purpose of impeachment. Gall v. Parker, 231 F.3d 265, 311 (6th Cir. 2001), *citing* Doyle v. Ohio, 426 U.S. 610, 618 (1976). The Sixth Circuit Court of Appeals has held that:

> While direct comments about a decision to remain silent or not to testify are clearly prohibited, indirect comments require a more probing analysis. . . . Such comments warrant reversal only when they are "manifestly intended by the prosecutor as a comment on the

> defendant's failure to testify or were of such a character that the jury would naturally and reasonably take them to be comments on the failure to the accused to testify." Bagby v. Sowders, 894 F.2d 792, 797-98 (6th Cir. 1990). A court should not find manifest intent from such comments if some other explanation for the prosecutor's remarks is equally plausible. . . . This occurs, for instance, when the comment is a "fair response to a claim made by defendant or his counsel." United States v. Robinson, 485 U.S. 25, 32 (1988).

Id. (internal citations omitted).

The cross-examination of Thomas focused upon Thomas's failure to contact police or desire to prosecute the person who assaulted him. While there is a brief and limited reference to the possibility of Petitioner talking with police, when read in context, it is equally plausible that the question was a comment on Thomas's credibility and not on Petitioner's lack of contact with police. Therefore, the prosecutor's cross-examination was not an improper comment on Petitioner's right to remain silent.

Petitioner apparently argues that the reference to "uncontroverted" testimony in his closing argument was a reference to Petitioner's failure to testify and refute the testimony. The Court finds that the prosecutor's reference to uncontroverted testimony was not a reference to Petitioner's failure to take the stand. It was simply the prosecutor's characterization of the

strength of the evidence presented and the defense's failure to present witnesses who effectively countered the prosecutions' witnesses. *See* Shaffer v. Boone, 3 Fed. Appx. 675, 684 (10th Cir. 2001) (holding that jury would not interpret prosecutor's reference to uncontroverted testimony to be a comment on defendant's failure to testify; instead, jury likely would view it as a comment on the strength of the evidence against defendant).

In addition, Petitioner argues that the prosecutor's argument that there is no explanation for why a loaded clip was found in Petitioner's house improperly shifted the burden of proof to Petitioner and commented on his failure to testify. The Court finds that the argument simply asked the jury to make a reasonable inference based upon the evidence presented and was not a comment on Petitioner's decision not to testify.

### C. Trial Judge's Statement to Jury Regarding Missing Witness

Petitioner argues that his right to due process was violated when the trial court informed the jury that the prosecution's only eyewitness was unavailable because he was deceased. Petitioner maintains that this information, coupled with Larry Lewis's testimony, served to invite speculation by the jury as to the cause of the witness's death which would cause the jury to be fearful.

Larry Lewis, a witness injured in the shooting, testified as follows, in response to a question regarding whether he still suffers pain or injuries as a result of being shot:

> Just mental pain to continue to relive this night over and over again for no reason at all. I don't even know why they shot me, why it even started. I never knew none of these people, but I just know my friends are dead.

Tr., Vol. II., p 54-55.

The Michigan Court of Appeals held that the trial court's instruction did not prejudice Petitioner:

> When the trial court informed the jury that Richards was deceased, it also instructed the jurors "to make no inferences or draw any conclusions from that circumstance." Jurors are presumed to understand and follow the trial court's instructions. People v. Graves, 458 Mich. 476, 486; 581 N.W.2d 229 (1998). Moreover, the trial court's use of the innocuous term "deceased" in reference to Richards was not calculated to convey that his death was attributable to a homicide, or that it was connected to defendant. The statement did not allow the jury to infer that Richards likely was murdered, or that defendant was involved in his death. Similarly, Lewis' comment about his friends being dead was too fleeting and vague to be deemed prejudicial to defendant.

Johnson, slip op. at 6.

The Court finds that the state court's resolution of this claim was not contrary to or an unreasonable application fo (sic) Supreme Court precedent.

### D. Alleged Ineffective Assistance of Counsel

Petitioner argues that his trial attorney was ineffective in the following ways: (i) failed to object to the closing of the courtroom to the public, (ii) erred in called witnesses Janard Thomas and Letrulia Johnson; (iii) opened the door for testimony on fear; (iv) failed to object to prosecutorial misconduct; and (v) failed to call an exculpatory eyewitness.

As an initial matter, Petitioner requests an evidentiary hearing on his claims of ineffective assistance of counsel. Petitioner appears to have been diligent in seeking an evidentiary hearing in state court. He filed a request for an evidentiary hearing in state court, which was denied. He also sought remand for an evidentiary hearing in both state appellate courts. Both state appellate courts denied his request for an evidentiary hearing. Even when a petitioner is diligent in requesting an evidentiary hearing, however, a federal court on habeas review is required to hold a hearing "only if the petitioner can demonstrate that (1) the grounds he alleges are sufficient to secure his release from custody, (2) relevant facts are in dispute, and (3) the state court did not provide a full and fair evidentiary hearing." Washington v. Renico, 455 F.3d 722, 731 n.4 (6th Cir. 2006). As discussed below, none of Petitioner's claims allege grounds sufficient to secure his release from custody. Accordingly, the Court finds an evidentiary hearing unnecessary.

To establish that he received ineffective assistance of counsel, a petitioner must show, first, that counsel's performance was deficient and, second, that counsel's deficient performance prejudiced the petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). A petitioner may show that counsel's performance was deficient by establishing that counsel's performance was "outside the wide range of professionally competent assistance." Id. at 689. This "requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." Id. at 687. To satisfy the prejudice prong, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. "[T]he focus should be on whether the result of the trial was 'fundamentally unfair or unreliable.'" Tinsley v. Million, 399 F.3d 796, 802 (6th Cir. 2005), *quoting* Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).

1.

First, Petitioner alleges that his attorney was ineffective in failing to object to the closing of the courtroom to the public for the testimony of three witnesses. The Michigan Court of Appeals held that, because the closure of the courtroom was justified under the circumstances, counsel was not ineffective in failing to object to the closure. Johnson, slip op. at 7. As discussed above, this Court held that the decision to close the courtroom for a limited time was not an unreasonable application of Waller. Therefore, the

Court finds that Petitioner has failed to establish that the failure to object to the closure fell "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 689.

2.

Petitioner argues that defense counsel erred in calling witnesses Janard Thomas and Letrulia Johnson because both witnesses provided damaging testimony. Both Thomas and Johnson testified that they observed Petitioner get hit in the back with a chair. Petitioner argues that this testimony ascribed a motive to Petitioner for the shooting.

The Michigan Court of Appeals held that counsel was not ineffective in calling these witnesses. The court observed that the testimony provided only "negligible" evidence of motive and that their testimony provided some evidence favorable to the defense. Johnson, slip op. at 7.

The Court has reviewed Thomas's and Letrulia Johnson's testimony and finds that both witnesses gave exculpatory testimony. For example, Thomas testified that he and Petitioner helped each other from the club. Thomas was bleeding from a head wound. Petitioner drove him to Thomas's mother's home for help. Thomas testified that Petitioner was with him the entire time and that they left the scene before any gunshots were fired. Therefore, it was reasonable trial strategy for counsel to present a witness who testified that Petitioner was not the shooter.

Letrulia Johnson testified that she was at the club on the night of the shooting. When the fighting

broke out, she and a female cousin headed to the door. She observed Petitioner, who is her cousin, being hit in the back with a chair and Thomas being hit on the head with a bottle. Letrulia Johnson and her female cousin then exited the building and walked to a vehicle. As they were trying to open the vehicle, they heard gunshots. Johnson's testimony corroborated Thomas's and was, therefore, useful for that purpose. The Michigan Court of Appeals' decision that trial counsel's decision to call Johnson and Thomas was not ineffective assistance is not contrary to or an unreasonable application of Strickland.

3.

Petitioner argues that his attorney was ineffective when he opened the door to testimony regarding a witness Damon Ramsuer's fear of testifying. As discussed in section V.B.1 above, Ramsuer's reluctance to testify became the subject of re-cross-examination after defense counsel opened the door to such testimony by asking Ramsuer the following question: "[I]f you had seen who fired shots that might have killed Carlos Davis, there's no reason for you not to have said that, was there?" Tr., Vol. II, p. 97. This question opened the door for the prosecutor to question Ramsuer regarding his reluctance to testify. Petitioner admits that "nothing damaging emerged on re-direct," but, nevertheless, argues that the prosecution's questions and reference to Ramsuer's reluctance to testify in closing argument prejudiced Petitioner because it implied that he had someone kill the witness Robert Richards and that Ramsuer feared the same would happen to him if he testified against Petitioner.

The Michigan Court of Appeals held that counsel's representation in this regard was not ineffective, stating, in pertinent part:

> By focusing on the detrimental effect of trial counsel's examination of Ramsuer, defendant overlooks the broader context that made counsel's questions reasonable trial strategy. Unless the jurors believed Ramsuer's claim that he unwittingly signed an inaccurate statement, they likely would have concluded that Ramsuer either lied to police or lied at trial, and wondered about his motives for lying. Trial counsel's cross-examination ostensibly sought to show that Ramsuer was being truthful at trial, because he had no motive to conceal knowledge that would bring his friend's murderer to justice. This question opened the door to the prosecutor raising fear as Ramsuer's motive to lie at trial, but the jury likely would have considered this possibility anyway. Under these circumstances, trial counsel's cross-examination of Ramsuer was not objectively unreasonable, but rather a reasonable attempt to reap the benefits of Ramsuer's unanticipated testimony.

Johnson, slip op. at 8.

The Court finds that the court of appeals analysis was not contrary to or an unreasonable application of Strickland. As the state court observed,

even absent defense counsel's question, the jury would have wondered why Ramsuer's testimony changed. Defense counsel's question gave Ramsuer an opportunity to tout the truthfulness of his trial testimony rather than his preliminary examination testimony. Defense counsel's attempt to put a positive spin on a damaging witness was not ineffective.

4.

Petitioner next argues that his trial attorney was ineffective in failing to object to various instances of prosecutorial misconduct. This Court has determined that Petitioner has not shown that the prosecutor engaged in misconduct. Therefore, his attorney was not ineffective in failing to object to the prosecutor's conduct.

5.

Finally, Petitioner argues that counsel was ineffective in failing to call an exculpatory witness, Jason Hodgson.

The Michigan Court of Appeals held that the failure to call Hodgson did not prejudice the defense, reasoning, in pertinent part:

> Hodgson told the police that he was driving past the hall when the shooting started, and that he saw a man in a silver jacket scream, "That's my sister," and then shoot at the crowd. Hodgson admitted that he did not get a good look at the man's face. Defendant argues that Hodgson's testimony would have exculpated him because he does not have

> sister and because Hodgson's description of the shooter's clothes did not match what defendant wore in the party photographs.
>
> Hodgson's statement is not sufficient to establish that trial counsel erred in failing to call him. The statement does not necessarily exculpate defendant because there was evidence of two shooters outside the hall. Detective Timothy Ketvertis, a police firearms examiner, determined that spent casings found at the scene were fired by two different guns. Moreover, defendant failed to submit any additional offer of proof, such as an affidavit from Hodgson, to establish that Hodgson was wiling and able to testify at trial consistent with his statement. Consequently, he has failed to dhow (sic) either that trial counsel erred in failing to call Hodgson, or that an evidentiary hearing was necessary to further explore that possibility.

Johnson, slip op. at 8.

Given that some evidence was presented of two shooters and that Richards identified Petitioner as the shooter, Petitioner has failed to show that the state court's conclusion was contrary to or an unreasonable application of Strickland. Moreover, given the testimony of Richards and Ramsuer's statement to police, Petitioner has failed to show a reasonable probability that the result of the proceeding would

have been different had Hodgson been called as a witness.

### E. Identification Procedure

Petitioner next argues that his right to due process was violated because the pretrial identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377 (1968). The identification at issue is that made by Robert Richards, the witness who was killed prior to trial. The trial court granted a motion for evidentiary hearing on this issue, but Richards was killed prior to the scheduled hearing.

"A conviction based on identification testimony that follows a pretrial identification violates the defendant's constitutional right to due process whenever the pretrial identification is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Ledbetter v. Edwards, 35 F.3d 1062, 1070 (6th Cir. 1994). A court must undertake a two-step analysis to determine the validity of a pretrial identification. First, the court must determine whether the procedure was unduly suggestive. If the court finds that the procedure was unduly suggestive, the court must then "evaluate the totality of the circumstances to determine whether the identification was nevertheless reliable." Id. Where an in-court identification was potentially impacted by an impermissibly suggestive out-of-court lineup, the governing test is whether "under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." Neil v. Biggers, 409 U.S. 188, 199 (1972).

Police Detective Szymanski obtained photographs of people taken at the party. On March 3, 2002, Detective Szymanski took the photographs to the hospitalized gunshot victims, Mathis and Lewis. After visiting his friend, Lewis, in the hospital, Robert Richards contacted Detective Szymanski and gave him a description of the clothing worn by the shooter. Richards subsequently went to the police station and viewed a group photograph containing men and women. He identified Petitioner as the shooter. Petitioner argues that, because the clothing worn by Petitioner in the photograph was similar to that described by Richards in his telephone call with Szymanski, the Detective should have added other photographs to the array containing men whose facial characteristics matched those of Petitioner. Petitioner maintains that the procedure used was equivalent to a one-man lineup.

The Michigan Court of Appeals denied Petitioner's claims, stating, in pertinent part:

> By showing Richards the photographs, the police did nothing to single out defendant, or to suggest to Richards that defendant was a suspect. The procedure is not analogous to the typical lineup situation where the police arrest a suspect, and place him in a lineup to test whether the witness can identify him. Unlike lineups and photographic arrays, which are composed and organized by the police, the photographs here were taken without any police involvement, for

purposes unrelated to a criminal investigation.

The use of the photographs was more akin to an on-the-scene identification, in which the police detain a suspect shortly after the crime and ask a witness if they have detained the correct person.

* * *

. . . The police used the photographs to determine which person from a large pool of potential suspects was the shooter. The photographs enabled them to do so with a reasonable likelihood of reliability and, as a practical matter, was no different than asking a witness to point out the perpetrator in a crowd. Indeed, the photographs here were less suggestive than an on-the-scene identification, where the witness views a single suspect in police custody.

Defendant claims that the procedure was unfair and unreliable, and the "equivalent of a one-man line-up," because he was the only person in the photographs wearing clothes that matched Richards' description. We disagree. Richards' reliance on the shooter's clothing did not render his identification unreliable. The shooting occurred as the partygoers were quickly leaving the hall, so clothing would serve

> as a reliable identifying characteristic. If, as defendant contends, his clothes were distinctive, then Richards' reliance on the clothes actually made his identification more, not less reliable. Defendant's attempt to compare the photographic identification to a lineup in which the suspect has been dressed to stand out, and match the witness' prior description, does not comport with either the facts of this case or the applicable law. We therefore find no error in the admission of Richards' identification, and no need to pursue the matter further at an evidentiary hearing.

Johnson, slip op. at 9-10.

The Court finds the Michigan Court of Appeals' analogy to an on-the-scene identification helpful. The Sixth Circuit Court of Appeals has recognized the value of show-up procedures, finding that conducting a showup is "consistent with legitimate law enforcement purposes," including allowing identification before a suspect has had the opportunity to alter his appearance. Drew v. Parker, 244 Fed. App'x 23, 28 (6th Cir. 2007). The Court concludes that the state court's determination that the identification procedure was not impermissibly suggestive was not contrary to or an unreasonable application of Supreme Court precedent.

Moreover, even assuming that the identification procedure was impermissibly suggestive, Petitioner has failed to show the identification at the preliminary examination was not reliable. Richards testified that

he had the opportunity to see the shooter from twenty feet away, and that, although it was dark outside, the lighting was sufficient for him to discern many details of the shooter's clothing, including the color of his hat and type of shoes he wore. Considering all of these factors, this Court concludes that the state court's determination that the identification was reliable was not contrary to or an unreasonable application of Supreme Court precedent.

In addition, there is no constitutional right to counsel at a photographic array. Van v. Jones, 475 F.3d 292, 311 (6th Cir. 2007); United States v. Ash, 413 U.S. 300 (1973),. Therefore, Petitioner fails to assert a constitutional violation with respect to this claim.

**F. Sentencing Claim**

Finally, Petitioner argues that he is entitled to habeas corpus relief because the trial court increased his sentence in reliance upon facts not found by a jury in violation of the Sixth and Fourteenth Amendments. *See* Blakely v. Washington, 543 U.S. 296, 303-05 (2004) (state trial court's action in sentencing defendant beyond the statutory maximum of the standard range for his offense based upon judicial finding of deliberate cruelty violated Sixth Amendment right to trial by jury).

In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. Michigan has an indeterminate sentencing system for most crimes,

including causing the death of another person while operating a motor vehicle under the influence of intoxicants. The maximum term of imprisonment is set by law. Mich. Comp. Laws § 769.8(1); *see also* People v. Drohan, 475 Mich. 140, 160-61 (2006). In Blakely v. Washington, 542 U.S. 296 (2004), the Supreme Court addressed indeterminate sentencing systems and held that such systems do not violate the Sixth Amendment. The Court explained:

> [The Sixth Amendment] limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal right to a lesser sentence-and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home

> unarmed is entitled to no more than a 10 year sentence-and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

Blakely, 542 U.S. at 308-09.

Judicial factfinding may not be used to impose a sentence "beyond the prescribed statutory maximum." Apprendi, 530 U.S. at 490. Under Michigan law, the statutory maximum for second-degree murder, Mich. Comp. Laws § 750.317, and assault with intent to commit murder, Mich. Comp. Laws § 750.83, is life imprisonment. The sentencing court did not impose a sentence beyond the statutory maximum. Therefore, the sentencing scheme did not run afoul of the Sixth Amendment. Because Blakely does not apply to indeterminate sentencing schemes like the one utilized in Michigan, the trial court's sentence did not violate Petitioner's constitutional rights. *See* Tironi v. Birkett, No. 06-1557, 2007 WL 3226198, * 1 (6th Cir. Oct. 26, 2007). ("Blakely does not apply to Michigan's indeterminate sentencing scheme."). Mumer v. Vasbinder, 2007 WL 1469419, * 4 (E.D. Mich. May 21, 2007); Chatman v. Lafler, 2007 WL 1308677, *2 (E.D. Mich. May 3, 2007); Jones v. Bergh, 2006 WL 1007602, *1-2 (E.D. Mich. April 17, 2006); George v. Burt, 2006 WL 156396, *5 (E.D. Mich. Jan. 20, 2006); Walton v. McKee, 2005 WL 1343060, *3 (E.D. Mich. June 1, 2005). Petitioner has thus failed to state a claim upon which habeas relief may be granted.

## VI. Conclusion

For the reasons stated, Petitioner has failed to show that she is incarcerated in violation of the

Constitution or laws of the United States. Accordingly, **IT IS ORDERED** that the petition for a writ of habeas corpus is **DENIED**.

s/Bernard A. Friedman
BERNARD A. FRIEDMAN
CHIEF UNITED STATES DISTRICT JUDGE

Dated: February 12, 2008

I hereby certify that a copy of the foregoing document was served upon counsel of record by electronic and/or first-class mail.
s/Carol Mullins
Case Manager to Chief Judge Friedman

**STATE OF MICHIGAN**
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 24, 2004

v

No. 247227
Wayne Circuit Court
LC No. 02-012133-01

WILLIAM DESHUN JOHNSON,
Defendant-Appellant.

---

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of second-degree murder, MCL 750.317, three counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 75.227b. He was sentenced to concurrent prison terms of thirty-five to sixty years for the murder conviction, and twenty to forty years each for the assault convictions, to be served consecutive to a two-year term for the felony firearm conviction. We affirm.

Defendant's convictions arise from the fatal shooting of Carlos Davis and non-fatal shooting assaults of James Mathis, Larry Lewis and Robert Richards outside a dance hall in Hamtramck on March 3, 2002. The shootings occurred after the victims and

several other persons left the hall after a large brawl broke out among partygoers. Only two persons, Robert Richards and Damon Ramsuer, reported seeing the shooter.

Richards told the police that he saw the shooter, and he gave a detailed description of his clothing. The police obtained photographs taken by a hired photographer before the fight broke out, and showed the photographs to Richards, who identified defendant as the shooter from one of these photographs. Richards identified defendant at the preliminary examination, but Richards was killed before defendant's trial. His preliminary examination testimony was read at trial.

The police also interviewed Ramsuer, who signed a statement declaring that he saw the shooter. Ramsuer also identified defendant from the party photographs. Ramsuer failed to appear for the preliminary examination. When he testified at trial, he denied seeing the shooter, denied telling the police that he saw the shooter, and denied making an identification. The prosecutor impeached him with the signed statement, and with the testimony of the officer who took the statement.

Defendant claims that the trial court violated his right to a public trial. We disagree.

At the start of trial, the prosecutor moved to close the courtroom to spectators during the testimony of three prosecution witnesses, Mathis, Lewis, and Ramsuer, who were afraid to testify publicly. The prosecutor explained that two other prosecution witnesses had been killed under suspicious

circumstances: Richards was killed in his bed, and Elvin Robinson was killed before the preliminary examination. Defense counsel agreed to exclude spectators for these witnesses, but asked the trial court not to do so in the jury's presence. The trial court never removed anyone from the courtroom, but instead instructed defendant's relatives not to arrive before 11:00 a.m. on the day that Mathis, Lewis, and Ramsuer testified, and to remain outside the courtroom until permitted to enter.

Because defense counsel did not object to the exclusion of spectators, this issue is not preserved and, therefore, is reviewed for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, three requirements must be met: (1) an error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected substantial rights. Id. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.* The plain error rule extends to unpreserved claims of both constitutional and nonconstitutional error. *Id.* at 764. Both the federal and state constitution guarantee criminal defendants the right to a public trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). However, the right to complain about an order of exclusion is waived where the defendant consents or fails to object. *People v Gratton*, 107 Mich App 478, 481; 309 NW2d 609 (1981); *People v Sylvester Smith*, 90 Mich App 20, 23; 282 NW2d 227 (1979). In the instant case, defendant expressly waived his right by

assenting to the trial court's decision to close the courtroom during the three witnesses' testimony.

Moreover, the right to a public trial is not absolute, and, under certain circumstances, higher interests may take precedence. In *Kline, supra* at 169, this Court, quoting *Waller v Georgia*, 467 US 39, 45; 104 S Ct 2210; 81 L Ed 2d 31 (1984), and *Press-Enterprise Co v Superior Court of California, Riverside Co*, 464 US 501, 510; 104 S Ct 819; 78 L Ed 2d 629 (1984), observed:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

The Court in *Kline* held that a trial court must satisfy four requirements before ordering a total closure.[1] These are:

> (1) The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure. [*Waller, supra*], quoting *Press-Enterprise Co, supra*. [*Kline, supra* at 169.]

Here, the record discloses that these four requirements were satisfied. The prosecutor showed that there was an overriding interest because three key witnesses, including two complainants, were justifiably afraid to testify because two other witnesses had been killed under suspicious circumstances. See *Nieto v Sullivan*, 879 F2d 743, 753 (CA 10, 1989). The closure was not broader than necessary to protect these witnesses'

---

[1] The *Kline* Court distinguished between total closures and partial closures, and noted that a partial closure requires a showing of only a substantial, rather than a compelling reason. *Id.* at 179, citing *Nieto v Sullivan*, 879 F2d 743, 753 (CA 10, 1989). Although the closure affected only three witnesses in the instant case, the fact that all spectators, including the defendant's family members, were excluded renders the closure total. See *Davis v Reynolds*, 890 F2d 1105, 1108-1110 (CA 10, 1989).

safety, and defendant did not propose an alternative means of protecting their safety. And, though the trial court did not specifically articulate findings in support of the closure, it is apparent from the record that the trial court's decision was based on the suspicious deaths of Richards and Robinson. Defendant's contention on appeal that closure was not permitted because the witnesses were not of tender years and there was no evidence of threats is unpersuasive; nothing in *Kline* restricts courtroom closures to circumstances involving very young witnesses or direct threats. We are satisfied that the suspicious deaths of two other witnesses were sufficient to justify concerns for the witnesses' safety.

Defendant also contends that his waiver was not knowingly or intelligently made because the trial court did not advise him of his rights. He analogizes to the requirements for accepting a defendant's waiver of the right to counsel or to a jury trial, and to the requirements surrounding guilty pleas. Defendant's argument is inconsistent with *Gratton*, *supra* at 478, wherein this Court held that the right to a public trial may be waived not only affirmatively, but also by a failure to object. Defendant cites no authority supporting his argument that a right to a public trial warrants the same safeguards as the right to counsel, a jury, or a trial, and therefore waives this argument. See *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994).

In sum, we conclude that the trial court did not plainly err when it ordered a brief closure of the trial to protect the safety of three witnesses. Further,

defendant has not shown that the court's decision affected his substantial rights.

II

Defendant raises several claims of prosecutorial misconduct. A defendant must preserve his claim of prosecutorial misconduct by making a timely and specific objection. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). This Court reviews preserved claims of prosecutorial misconduct case by case, examining the remarks in context to determine whether the defendant received a fair and impartial trial. *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003). Review of unpreserved claims of misconduct is limited to whether the alleged misconduct constituted plain error affecting the defendant's substantial rights. *Id.*

A

Defendant claims that the prosecutor denigrated his counsel's veracity by suggesting that defense counsel concocted defense witnesses' testimony. The prosecutor's argument referred to seven defense witnesses, mostly related to defendant, who testified that they were at the party with defendant, but who did not contact the police or come forward with their information until defense counsel contacted them shortly before trial. Trial counsel did not object to the prosecutor's argument, so our review is for plain error.

A prosecutor may not question a defense counsel's veracity, or suggest that defense counsel intentionally sought to mislead the jury. *People v*

*Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001); *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). The prosecutor may, however, point out the deficiencies in a defendant's case, and argue from the facts that a witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 544-545; 575 NW2d 16 (1997). The prosecutor's arguments here were not improper under these principles. The defense witnesses' failure to come forward sooner, following a violent event that led to serious criminal charges against a relative, cast doubt on their credibility and undermined the defense. Defendant has failed to establish plain error.

B

Defendant claims that the prosecutor repeatedly injected the element of fear in the trial; specifically, when: (1) he commented during opening statement that Richards was not available to testify, and that the jury would learn more about this during the trial; (2) he commented during closing argument that Lewis was still afraid; and (3) he suggested that Ramsuer changed his story and tried to avoid testifying because he was afraid. Prosecutors "should not resort to civic duty arguments that appeal to the fears and prejudices of jury members." *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999).

Defendant did not object to these specific incidents, but he moved before trial to preclude the prosecutor from questioning witnesses about their fear. The trial court agreed. Even if defendant's general objection can be viewed as sufficient to preserve his claims of prosecutorial misconduct, the challenged

remarks did not deprive him of a fair and impartial trial. The remark about Richards' unavailability was too vague to suggest to jurors that Richards had been killed, or that his death was related to the trial. Only a person fully informed of the circumstances of Richards' death—and the jurors were not—could give the statement such an interpretation. The comment about Lewis' fear was based directly on Lewis' testimony that he still felt "mental pain to continue to relive this night over and over again for no reason at all." The prosecutor's remark did not invoke the element of fear; the prosecutor merely observed that Lewis, like other victims of violent crimes, continued to feel anguish long after the event.

We also find no improper invocation of fear or emotion where the prosecutor asked the jury to "[t]hink about why [Ramsuer] wouldn't [identify defendant] in court" and to "[t]hink about the reasons why we had to lock him up to bring him to court to tell on his own friend, Mr. Davis, how he was murdered." Ramsuer was an important witness who denied making prior inculpatory statements or previously identifying defendant as the shooter. Asking the jurors to draw reasonable inferences as to why he would do so was highly relevant to the issue of whether Ramsuer's trial testimony was credible. The prosecutor's argument was not made to appeal to the jurors' emotions, nor did it ask the jurors to convict defendant for any reason other than that the evidence established his guilt.

C

Defendant claims that the prosecutor improperly shifted the burden of proof to the defense, and

commented on defendant's right to remain silent, during the cross-examination of a defense witness, Janard Thomas, and again during closing argument. We review these claims for plain error, inasmuch as defendant did not object at trial.

The prosecutor may not comment on a defendant's failure to testify, because such an argument undermines the presumption of innocence and the defendant's right against compelled self-incrimination. *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995). A prosecutor also may not suggest that a defendant is obligated to prove something, because such an argument tends to shift the burden of proof. *Id.* at 113-115. However, the prosecutor may argue from the facts that a defendant's positions are not worthy of belief. *Howard*, *supra* at 548. Additionally, the prosecutor's arguments must be considered in light of defense arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Janard Thomas testified that he was hit in the head with a bottle, and defendant was hit in the back with a chair during the fight. Thomas claimed that defendant then helped him up from the floor, and the two fled from the hall and drove home. On cross-examination, the prosecutor questioned Thomas about his and defendant's failure to report the assaults to the police, though defendant might have been able to identify the person who hit Thomas. These questions did not implicate defendant's right to remain silent, but instead highlighted a weakness in Thomas' testimony.

Defendant also objects to the prosecutor's statement during closing argument that Richards' testimony about seeing defendant fire the gun repeatedly was uncontroverted. A prosecutor's statement that certain inculpatory evidence is undisputed does not constitute a comment regarding the defendant's failure to testify, particularly where someone other than the defendant could have provided contrary testimony. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996). Here, Richards' testimony was uncontroverted. Denise Chatman testified that she saw another person fire a gun, but she also testified that there seemed to be two shooters. Because persons other than defendant could have disputed Richards' testimony, but did not, the prosecutor's remark was proper.

Defendant's final claim of prosecutorial misconduct challenges the prosecutor's statement that there was no explanation for why defendant would possess a loaded magazine, but no gun. This was not a burden-shifting argument, but rather a comment on the evidence. The argument did not focus on defendant's failure to explain the evidence; instead, it implied that the evidence was inculpatory because a likely explanation was that defendant disposed of the gun.

In sum, the prosecutor did not make improper references to defendant's right to remain silent, or make improper attempts to shift the burden of proof in any of these alleged instances of misconduct. We therefore find no plain error.

III

Defendant argues that he was unfairly prejudiced when the trial court informed the jury that Richards' preliminary examination testimony would be read because Richards was deceased. Defendant opines that the jury must have realized that Richards was murdered, and inferred that his murder was connected to defendant's case. He argues that he was further prejudiced when Lewis stated, "My friends are dead," which could have signaled to the jury that defendant was involved in the murder of others, including Richards.[2] Defendant preserved this issue by twice requesting the trial court to indicate only that Richards was "unavailable." Because this issue is in the nature of an evidentiary issue, we review the trial court's decision for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

We find no abuse of discretion. When the trial court informed the jury that Richards was deceased, it also instructed the jurors "to make no inferences or draw any conclusions from that circumstance." Jurors are presumed to understand and follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Moreover, the trial court's use of the innocuous term "deceased" in reference to Richards was not calculated to convey that his death was attributable to a homicide, or that it was connected to defendant. The statement did not allow the jury to infer that Richards likely was murdered, or that

---

[2] Defendant unsuccessfully moved for a mistrial based on Lewis' statement. He does not challenge the denial of his request for a mistrial on appeal.

defendant was involved in his death. Similarly, Lewis' comment about his friends being dead was too fleeting and vague to be deemed prejudicial to defendant.

IV

Defendant raises several claims of ineffective assistance of counsel. Unless a defendant claiming ineffective assistance of counsel moves for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent on the record. *Rodriguez*, *supra* at 38. Here, defendant moved in the trial court for a *Ginther* hearing, but the trial court denied the motion.

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

A

First, defendant contends that counsel was deficient for agreeing to the closure of the courtroom during the testimony of three prosecution witnesses. As discussed in part I above, the trial court's decision to exclude spectators was justified under the circumstances. Accordingly, trial counsel's

acquiescence was neither objectively unreasonable, nor outcome-determinative.

B

Next, defendant claims that trial counsel was deficient for calling Janard Thomas and Letrulia Johnson as defense witnesses. Thomas and Johnson both testified that they saw defendant get hit with a chair during the fight in the hall. Defendant maintains that this testimony helped the prosecution establish that defendant had a motive to shoot Lewis, Mathis, and Davis. Lewis had testified that he swung a folding chair at the crowd of people attacking Robinson, and that he carried the chair out of the hall with him for protection. The prosecutor asked during closing argument whether it was a coincidence that defendant shot the person who held the chair.

Defendant has not overcome the presumption that calling Thomas and Letrulia was sound trial strategy. See *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). All of the witnesses who described the fight portrayed the eruption as a donnybrook, in which numerous persons were pushed and hit with chairs and bottles. Letrulia testified that defendant was "down" after being hit with the chair, suggesting that he could not have left the hall in time to commit the shooting. Thomas' testimony indicated that defendant took Thomas home and helped dress a head wound he sustained when he was hit with a bottle. To the extent being hit by a chair could be viewed as a motive for this shooting, defendant was only one of several persons with that motive. Also, the jury could have inferred that defendant was struck during the

fight even without the witnesses' testimony. Under these circumstances, Thomas' and Letrulia Johnson's testimony provided only negligible evidence of a motive, and their testimony cannot be characterized as only harming defendant's interests.

C

Defendant claims that trial counsel was ineffective because he opened the door to allowing the prosecutor to question Ramsuer about his fear of defendant. At the start of trial, defense counsel asked the trial court to preclude the prosecutor from questioning witnesses about their fear of defendant. The trial court agreed, unless the prosecutor could show some special need to explore a witness' fear. Subsequently, during defense counsel's cross-examination of Ramsuer, Ramsuer reiterated that he never told the police that he saw the shooter and never identified defendant as the shooter from the party photographs, notwithstanding the statement he signed. Defense counsel then elicited that Davis was Ramsuer's friend, and that Ramsuer had no reason not to reveal who killed his friend, if he knew.

The trial court agreed with the prosecutor that trial counsel's questions opened the door to allow the prosecutor to elicit testimony that Ramsuer was fearful of defendant. On redirect examination, the prosecutor did not specifically question Ramsuer about his fear, but elicited Ramsuer's admission that he had no reason to lie to the police in the investigation of his friend's murder, and reviewed Ramsuer's subsequent lack of cooperation throughout the case.

By focusing only on the detrimental effect of trial counsel's examination of Ramsuer, defendant overlooks the broader context that made counsel's questions reasonable trial strategy. Unless the jurors believed Ramsuer's claim that he unwittingly signed an inaccurate statement, they likely would have concluded that Ramsuer either lied to the police or lied at trial, and wondered about his motives for lying. Trial counsel's cross-examination ostensibly sought to show that Ramsuer was being truthful at trial, because he had no motive to conceal knowledge that would bring his friend's murderer to justice. This question opened the door to the prosecutor raising fear as Ramsuer's motive to lie at trial, but the jury likely would have considered this possibility anyway. Under these circumstances, trial counsel's cross-examination of Ramsuer was not objectively unreasonable, but rather a reasonable attempt to reap the benefits of Ramsuer's unanticipated testimony.

D

Defendant claims that counsel was ineffective for failing to object to the alleged prosecutorial misconduct discussed in part II above. Because we have already concluded that none of these claims constituted plain error, counsel's failure to object did not constitute ineffective assistance.

E

Defendant contends that trial counsel was ineffective for failing to call Jason Hodgson to testify. Defendant raised this issue in his motion for a new trial. Hodgson told the police that he was driving past

the hall when the shooting started, and that he saw a man in a silver jacket scream, "That's my sister," and then shoot at the crowd. Hodgson admitted that he did not get a good look at the man's face. Defendant argues that Hodgson's testimony would have exculpated him because he does not have a sister and because Hodgson's description of the shooter's clothes did not match what defendant wore in the party photographs. Hodgson's statement is not sufficient to establish that trial counsel erred in failing to call him. The statement does not necessarily exculpate defendant because there was evidence of two shooters outside the hall. Detective Timothy Ketvertis, a police firearms examiner, determined that spent casings found at the scene were fired by two different guns. Moreover, defendant failed to submit any additional offer of proof, such as an affidavit from Hodgson, to establish that Hodgson was willing and able to testify at trial consistent with his statement. Consequently, he has failed to show either that trial counsel erred in failing to call Hodgson, or that an evidentiary hearing was necessary to further explore that possibility.

V

Defendant challenges the trial court's failure to hold an evidentiary hearing on his claim that the police used an impermissibly suggestive procedure when Richards identified him from a group photograph taken by a hired photographer during the party before the fight broke out. Defendant moved to suppress the identification, and for an evidentiary hearing on this claim. Although the trial court did not believe that an evidentiary hearing was warranted, it agreed to hold a hearing and scheduled it for December 20, 2002. For

reasons that are not clear from the record, the hearing was never held.

It is not necessary to determine why a hearing was never held, or to address the prosecution's claim that defendant effectively abandoned the issue by failing to renew his motion for a hearing. The record is sufficient to review this issue on the merits. The police officer's use of the photographs for identification purposes did not trigger concerns about unduly suggestive procedures.

An unduly suggestive identification procedure that is conducive to "irreparable misidentification" constitutes a denial of due process. *People v Kurylczyk*, 443 Mich 289, 302303; 505 NW2d 528 (1993); *People v Kevin Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). If a witness identifies a defendant through an impermissibly suggestive identification procedure, evidence concerning the identification is inadmissible at trial unless an independent basis for an in-court identification can be established "that is untainted by the suggestive pretrial procedure." *Kurylczyk, supra* at 303; *Williams, supra* at 542-543. Our Supreme Court stated in *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998):

> A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993); *Simmons v United States*, 390 US 377,

> 384; 88 S Ct 967; 19 L Ed 2d 1247 (1968). In *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973), we noted that an improper suggestion often arises when "the witness is told or believes that the police have apprehended the right person." Moreover, when "the witness is shown only one person or a group in which one person is singled out in some way, he is tempted to presume that he is the person." *Id.*

In *Gray*, the Court further emphasized that "the exhibition of a single photograph 'is one of the most suggestive photographic identification procedures that can be used.'" *Id.*, quoting Sobel, *Eyewitness Identification* (2d ed), § 5.3(f), p 5-42.

The use of the party photographs in the instant case did not trigger the suggestiveness concerns in *Gray* and *Kurylczyk*. By showing Richards the photographs, the police did nothing to single out defendant, or to suggest to Richards that defendant was a suspect. The procedure is not analogous to the typical lineup situation where the police arrest a suspect, and place him in a lineup to test whether the witness can identify him. Unlike lineups and photographic arrays, which are composed and organized by the police, the photographs here were taken without any police involvement, for purposes unrelated to a criminal investigation.

The use of the photographs was more akin to an on-the-scene identification, in which the police detain a suspect shortly after the crime and ask a witness if

they have detained the correct person. This Court stated in *People v Winters*, 225 Mich App 718, 728; 571 NW2d 764 (1997):

> Such on-the-scene confrontations are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance. . . . Whatever the perceived problems of on-the-scene confrontations, it appears to us that prompt confrontations will, if anything, promote fairness by assuring greater reliability. [Citations omitted.]

In *People v Libbett*, 251 Mich App 353, 360-363; 650 NW2d 407 (2002), this Court approved an on-the-scene identification, despite a two-hour lapse between the crime and the identification, where there "was nothing in the record to suggest that the police made any suggestive comments at the identification or that the police were acting for reasons other than to determine 'whether there [was] a reasonable likelihood that the suspect [was] connected with the crime and subject to arrest, or merely an unfortunate victim of circumstances.'" *Id.*, quoting *Winters*, *supra* at 728.

The use of the party photographs in the instant case do not precisely fit the on-the-scene identification scenario of *Winters* and *Libbett*, but the analysis in these cases is apt nonetheless. The police used the photographs to determine which person from a large

pool of potential suspects was the shooter. The photographs enabled them to do so with a reasonable likelihood of reliability and, as a practical matter, was no different than asking a witness to point out the perpetrator in a crowd. Indeed, the photographs here were less suggestive than an on-the-scene identification, where the witness views a single suspect in police custody.

Defendant claims that the procedure was unfair and unreliable, and the "equivalent of a one-man line-up," because he was the only person in the photographs wearing clothes that matched Richards' description. We disagree. Richards' reliance on the shooter's clothing did not render his identification unreliable. The shooting occurred as the partygoers were quickly leaving the hall, so clothing would serve as a reliable identifying characteristic. If, as defendant contends, his clothes were distinctive, then Richards' reliance on the clothes actually made his identification more, not less reliable. Defendant's attempt to compare the photographic identification to a lineup in which the suspect has been dressed to stand out, and match the witness' prior description, does not comport with either the facts of this case or the applicable law. We therefore find no error in the admission of Richards' identification, and no need to pursue the matter further at an evidentiary hearing.

VI

Defendant challenges the sentencing court's scoring of the sentencing guidelines, and its decision to exceed the guidelines by forty-five months with respect to his sentence for second degree murder.

Defendant objected to the sentencing court's scoring of offense variables 4, 5 and 9 at sentencing; therefore, these issues are preserved. MCL 769.34(10); MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002). This Court reviews a sentencing court's scoring decision to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. See *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Offense variable (OV) 4, psychological injury to a victim, assigns a score of ten points where the victim sustains "[s]erious psychological injury requiring professional treatment." MCL 777.34(1)(a). The sentencing court is directed to score ten points "if the serious psychological injury may require professional treatment," but "the fact that treatment has not been sought is not conclusive." MCL 777.34(2). Defendant received ten points for this variable. We conclude that the evidence supported the score of ten points because Lewis testified that he was still suffering "mental pain" and continued "to relive this night over and over again."

OV 5 assigns fifteen points where the victim's family member suffers "[s]erious psychological injury requiring professional treatment." MCL 777.35(1)(a). As with OV 4, the fact that treatment has not been sought is not conclusive. MCL 777.35(2). Ruby Davis, Davis' "adopted aunt," stated at the sentencing hearing that Davis' mother and other family members were "a nervous wreck" and unable to go about their everyday lives. His mother was taking medication, she could not

sleep, and she was afraid to leave the house. This evidence was sufficient to support a score of fifteen points for OV 5.

The sentencing court scored twenty-five points for OV 9, number of victims, which is appropriate where there are ten or more victims. MCL 777.39(b). Each person who is placed in danger of injury or loss of life is considered a victim for purposes of scoring this variable. MCL 777.39(2)(b). The sentencing court reasoned that defendant randomly fired into a crowd of at least ten people, all of whom could be considered victims of the assault. We agree that the evidence was sufficient to support the trial court's score. Several witnesses testified that there were at least one hundred persons in the hall, and that most of them exited the hall during the fight. This would have placed most of them outside the hall at the time of the shooting. It is reasonable to infer, as the sentencing court did, that the randomness of the shooting placed all of them in danger of injury, and thus they were victims of the shooting spree.

The guidelines minimum sentence range for defendant's second-degree murder conviction was 225 to 375 months or life in prison. The sentencing court commented, however, that the guidelines did not "look at and score the impact of that kind of offense where someone shoots other persons in this particular way." The court explained:

> Here, I think that what bothers me about this case and so many that I see like this, and you know this happens all the time: Someone is upset, angered because of

> something that happened; and they want to take the ultimate revenge in that for whatever reason, whether it be bad judgment or just wanting to establish one's self in terms of what their reputation may be, whatever it may be.

The sentencing court commented that defendant shot randomly into a large crowd out of anger after being hit with a chair in the brawl, and killed a person who had done nothing to victimize defendant. The court asserted that these circumstances warranted an upward departure from the guidelines, and sentenced defendant to thirty-five to sixty years in prison for second-degree murder. The minimum sentence exceeded the guidelines by three years and nine months.

MCL 769.34 requires a sentencing court to sentence a defendant within the guidelines range, but allows for departures from the guidelines for substantial and compelling reasons. MCL 769.34(2) and (3); *People v Babcock*, 469 Mich App 247, 255; 666 NW2d 231 (2003); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The sentencing court must articulate its reasons for the departure on the record, and its reasons must be "objective and verifiable." MCL 769.34(3); *Babcock*, *supra* at 257-259. The sentencing court may not base a departure on a factor already taken into account in determining the appropriate sentence range, unless the court finds from the facts in the record that the factor has been given inadequate or disproportionate weight. *Id.* at 258 n 12. Departures from the guidelines are appropriate where

a sentence within the guidelines range is not proportionate to the seriousness of the offense. *Id.* at 264. The determination whether a particular factor is objective and verifiable is reviewed as a matter of law, whereas the determination that objective and verifiable factors constitute substantial and compelling reasons for departure is reviewed for an abuse of discretion. *Id.* at 264-265.

We find no error in the court's upward departure. In explaining why a departure from the guidelines was warranted, the court stated that the guidelines did not account for the depravity displayed by defendant's conduct of unleashing deadly force against an entire crowd of people merely because he was angry that one person had hit him with a chair. Contrary to defendant's argument, these circumstances were not adequately accounted for by the guidelines. Neither OV 9, multiple victims, nor OV 6, intent to kill, adequately addressed the circumstance of defendant avenging a comparatively minor incident with a shooting spree against dozens of persons. This reason is also objective and verifiable, and consistent with the evidence. The court did not abuse its discretion in determining that these circumstances presented a substantial and compelling reason to depart from the guidelines. *Id.* at 264.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad